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Supreme Court of Judicature.

CASES DETERMINED IN THE
CHANCERY DIVISION
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LUNACY
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1933.—Ch.

PUBLISHED BY THE COUNCIL AT ITS OFFICE, 30, MONTAGUE STREET,
LONDON, W.C. 1,
AND
PRINTED BY W. SPEAIGHT & SONS, LTD., 98-99, FETTER LANE, LONDON, E.C. 4.

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270	After line 10.	Add *Stafford Crossman* for the *Attorney-General*.
515	9 from bottom.	For " from eve to eve " read " from eaves to eaves."
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CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

In re GEORGE INGLEFIELD, LIMITED.

[No. 00782 of 1931.]

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1932
EVE J.
Feb. 11, 12, 16.
C. A.
May 25, 30; *June* 8, 9.

Company—Winding-up—Hire-purchase Agreements—Financing Agreement with Discount Company—Assignment of Goods subject to Hire-purchase Agreements—Whether Contract of Sale or Charge—Sale—Not invalid against Creditors for want of Registration—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 93—*Companies Act*, 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *s.* 79.

A company carrying on a furnishing and drapery business went into voluntary liquidation in September, 1931, and its assets were insufficient for the payment of its creditors in full. A large proportion of its business consisted in letting out furniture on hire-purchase agreements, and for financing these agreements the company had entered into agreements with a discount company.

The agreements were made on a printed form, and provided that the discount company should purchase from the company (described as "the dealer") any goods the subject of hire-purchase agreements which the dealer should offer to sell, and also the benefit of the respective hire-purchase agreements. The dealer was to submit to the discount company for their approval the hire-purchase agreement in the standard form supplied by the discount company and all information in his possession relating to the hirer. On approval, the discount company was to forward to the dealer a series of bills of exchange, to be accepted by the dealer, equal in number to the instalments then payable by the hirer, and in aggregate amount to 75 per cent. of the purchase money payable. In respect of each offer accepted by the discount company the dealer was to send to that company a certificate of delivery of the goods to the hirer, and an acknowledgment of receipt thereof, an absolute assignment to the discount company of the goods and the hire-purchase agreement, a notice of the assignment signed by the dealer and addressed to the hirer (but not then to be used), and the series of bills of exchange. The purchase price on the assignment was to be the same as the total of the instalments of rent, 75 per cent. of which was to be paid forthwith, less an undisclosed amount described as a "finance charge" at the company's rate for the time being. The balance of the purchase price was to be paid by the discount company to the dealer in the form of instalments, equal in number to the instalments of rent payable by the hirer, and equal in amount to the difference between the instalment of rent and the amount of the bill delivered by the dealer. This balance was in fact retained out of the instalments of rent paid by the hirer. The dealer guaranteed to the discount company the payment by the hirer of his rent under every hire-purchase agreement assigned to the company, and by way of collateral security accepted and delivered the above-mentioned bills of exchange, the dealer retaining the difference between the instalment of rent and the bill on every payment. The discount company undertook not to give notice to the hirer of the assignment except in case of default by the hirer or the dealer. After the discount company had received payment from the hirer or the dealer in respect of all hire-purchase agreements comprised in any assignment of the full purchase price, with interest (if any) and costs, the discount company was to allow the dealer to retain all subsequent instalments of rent (if any) and other moneys, and was to account to the dealer for any sums in excess of the purchase price which it had itself received. If the hirer should fail to pay any instalments of rent due under his hire-purchase agreement within seven days after it became due or gave notice to the dealer of his intention to determine such agreement or made default in the observance of any of its terms and conditions, the dealer was forthwith to give notice to the hirer of the purchase by the discount company of the goods, the subject-matter of such agreement and the assignment to the discount company of such agreement, and to require the hirer to pay all sums thenceforth payable under such agreement to the discount company.

On a summons taken out by the liquidator claiming that all assignments of goods and hire-purchase agreements made under the above agreement were mortgages or charges of book debts and therefore void as against the creditors for non-registration under s. 79 of the Companies Act, 1929, and s. 93 of the Companies (Consolidation) Act, 1908:—

Held (reversing the decision of Eve J.), that the agreements entered into between the dealer and the discount company in the above form were for an out-and-out sale, and that the assignments made thereunder did not, therefore, require registration under either of the above sections.

SUMMONS in a winding-up.

The facts, which are more fully stated in the judgment of Eve J., were briefly as follows:—

The company, George Inglefield & Co., Ld., was incorporated in 1915 with a capital of 5000*l.* and carried on business as retailers of furniture and drapery goods at Dorking. In order to sell furniture on the hire-purchase system it had entered into a series of agreements with a finance company, the Industrial Discount Company, under which the goods the subject of any hire-purchase agreement were assigned, subject to and with the benefit of the hire-purchase agreement, by George Inglefield & Co., Ld., to the discount company. The assignment was expressed to be absolute, and not by way of charge; but the liquidator took out the summons asking for a declaration that all the assignments made under the general agreement or agreements between the parties were in fact charges on book debts or were otherwise within s. 79 of the Companies Act, 1929, or s. 93 of the Companies (Consolidation) Act, 1908, and not having been registered under one or other of these sections were void against the creditors in the winding-up.

The material clauses and effect of the principal agreemen are fully set forth in the judgment of the learned judge.

Clayton K.C. and *Wilfrid Hunt* for the liquidator. On the general construction of this document it is not an absolute assignment. No notice is to be given to the hirer except in case of his default. The discount company are precluded from making any profit out of the assignment except their finance charge, which is interest for the advance. There is a personal guarantee of the hirer, and clause 18 is a proviso for redemption. The agreement creates a charge on the future book debts of the company, and is void against the creditors. The language of clause 31 of the agreement implies that it is not a transaction of sale.

Cyril Atkinson K.C. and *W. N. Stable* for the Industrial Discount Company. The document is not a mere charge, but an absolute assignment. The bill of exchange to be given is only a collateral security for the payment of the instalment to the discount company. If at the end of two months the hirer returns the furniture, the bills come to an end, and the furniture becomes the property of the discount company. The object of clause 18 is to give the dealer the right to collect the instalments on his own account and not merely as agents for us. It is not an equity of redemption. The document does not create any charge. It is an out and out sale subject to a hire-purchase agreement. Future instalments payable under a hire-purchase agreement are not book debts: *Manchester, Sheffield and Lincolnshire Ry. Co.* v. *North Central Wagon Co.* (1); *Helby* v. *Matthews* (2); *Stacey* v. *Hill.* (3) Debts do not include contingent liabilities: *Ex parte Kemp* (4); *Blakey* v. *Trustees of Property of Pendlebury* (5), per Romer J. In *In re Isaacson* (6) the facts and the agreement were somewhat similar to those of the present case. An assignment by way of mortgage of a piano and a hire-purchase agreement relating to the piano was impeached, and it was held as regards the piano that it was void as an unregistered bill of sale, but it was severable and good as regards the assignment of the agreement, therefore it was not wholly void. It has never been held that contingent liabilities are debts. Debts which only become payable in future are not debts at all. The case does not come within s. 79 of the Act.

Clayton K.C. in reply.

Cur. adv. vult.

Feb. 16. EVE J. George Inglefield, Ld., was incorporated as a private company on August 13, 1915, with a capital of 5000*l.* in shares of 1*l.* each. It went into voluntary liquidation on September 24, 1931, and its assets are insufficient to pay its creditors in full.

Its business was that of drapers and furnishing and general warehousemen, and consisted largely in letting out furniture under hire-purchase agreements. In order to procure capital for the purpose of providing goods to be so let on hire the company from time to time entered into a series of agreements with the respondents, the Industrial Discount Company, Ld., and by this summons the liquidator seeks a declaration that these agreements are void as against him and the company's creditors for want of registration under s. 79 of the Companies Act, 1929, or s. 93 of the Companies (Consolidation) Act, 1908.

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(1) (1888) 13 App. Cas. 554, 567.
(2) [1895] A. C. 471, 475.
(3) [1901] 1 K. B. 660.
(4) (1874) L. R. 9 Ch. 383.
(5) [1931] 2 Ch. 255.
(6) [1895] 1 Q. B. 333.

His case is that although these agreements may assume the appearance of being sales and absolute assignments, the transactions were in fact mortgages and charges, and to hold the contrary would be to ignore the substance and give effect to the form.

The respondents do not dispute that the substance of the transaction evidenced by the agreement must be looked at and not its mere words, but adopting the opening sentence of Lord Herschell's speech in *Helby* v. *Matthews* (1) they maintain that "the substance must, of course, be ascertained by a consideration of the rights and obligations of the parties, to be derived from a consideration of the whole of the agreement."

Before embarking on the careful examination of the documents which this consideration involves, I desire to read a passage from Lord Macnaghten's speech in the same case. It sounds a note of warning not altogether inapplicable to the present case. (2) "The learned counsel for the respondents spoke of dealings of this sort with an air of righteous indignation as if they were traps for the extravagant and the impecunious—mere devices to tempt improvident people into buying things which they do not want and for which at the time they cannot pay. I think that is going too far. I do not see why a person fairly solvent and tolerably prudent should not make himself the owner of a piano or a carriage or anything else by means of periodical payments on such terms as those in question in the present case. The advantages are not all on one side. If the object of desire loses its attractions on closer acquaintance—if faults are developed or defects discovered—if a coveted treasure is becoming a burthen and an encumbrance it is something, surely, to know that the transaction may be closed at once without further liability and without the payment of any forfeit. If these agreements are objectionable on public grounds it is for Parliament to interfere. It is not for the Court to put a forced or strained construction on a

(1) [1895] A. C. 475.

(2) [1895] A. C. 482.

written document or to import a meaning which the parties never dreamed of because it may not wholly approve of transactions of the sort." Those words were spoken nearly forty years ago, and with the arrival since then of the motor-car, and aeroplane, wireless installations and gramophones and the Encyclopædia Britannica they certainly lose none of their force when applied to the condition of things prevailing to-day.

I turn now to the documents, and approach their construction on the footing that the company was engaged in a legitimate business, that the business involved the raising of capital from time to time by the issue of shares or borrowing or by some other lawful means, and that the company was minded to adopt a method by which it would avoid the obligation of registering any of the documents under the Companies Acts. Arguments have been advanced on behalf of the liquidator which would appear to be founded on some suggestion that the company's desire to escape registration was improper and open to suspicion. I do not adopt that view. There are obviously several grounds upon which it might be legitimately explained. It involves expense which would probably have to be borne ultimately by the hirer, publicity to which he might not unnaturally take exception, and disclosure to trade rivals of the names and addresses of customers. One has only to cast one's eye over the schedule to the summons to appreciate these objections, but I do not dwell on these matters, because in my opinion the company was acting within its rights in seeking a means of increasing its available capital without the obligation to register. The respondent company was the source to which the company resorted for the money required, and their mutual relationship is embodied in three documents. The first is the hiring agreement; that is made between the company, therein referred to as "the owners," of the one part, and the customer, therein referred to as "the hirer," of the other part. Its relevant terms are substantially the same as the agreement under consideration in *Helby* v. *Matthews* (1): the hirer had an option and nothing more, he was not bound to purchase, he obtained possession of the furniture and was entitled to its use so long as he paid the owners the agreed rent on the appropriate days, and he was bound to make these payments so long as he retained possession of the goods. If he continued to make them for the period during which they were stipulated to be payable the furniture then became his property, but he might at any time return the goods, and upon so doing he would no longer be liable to make any further payment beyond the instalment then due and, if the goods were returned within a limited period from the commencement of the hiring, an agreed further sum by way of compensation for the depreciation of the goods. There are several other clauses relating to the possession of the goods and the protection of the owners, but I do not think I need refer to any of these except No. 12, whereby the owners reserve the right to assign the benefit of and the right in and remedies under the agreement.

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(1) [1895] A. C. 471.

The second document is the agreement between the respondents, therein called "the company," of the one part, and the liquidating company, therein called "the dealer," of the other part, whereby after reciting that the dealer had requested the company to purchase from him from time to time such goods as he had let on hire subject to and with the benefit of the hire-purchase agreements relating thereto and that the company had agreed so to do on the terms thereinafter appearing, it was agreed by clause 1 that during the continuance of that agreement and subject to the provisions thereinafter contained, the company should purchase from the dealer such goods as should have been let on hire by the dealer from time to time on hire-purchase terms, and as the dealer should offer to sell to the company subject to and with the benefit of the hire-purchase agreements relating to such goods respectively.

Clauses 2, 3 and 4 enumerate certain conditions with which the company requires the dealer to comply before and on submitting any hire-purchase agreement to the company for approval. The submission, which may include more than one hiring agreement, is to constitute an offer to sell, and under

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clause 5 within two days the company is to notify the dealer which, if any, of the offers it accepts.

Passing over clauses 6, 7 and 8 for the moment, I come to clause 9, which provides that subject to the provisions of the agreement the price payable by the company to the dealer for the goods comprised in any hire-purchase agreement, thereinafter called "the purchase price," shall be such a sum as shall be equal to the total amount payable by the hirer by way of rent under such agreement and not due by the date on which such goods shall have been assigned to the company, therein called "the date of assignment."

By clause 10 a first payment of 75 per cent. of the purchase price is to be made forthwith after the company shall have received from the dealer certain documents enumerated in clause 8. The remaining 25 per cent. of the purchase price is to be divided into instalments corresponding in number to the number of instalments of rent payable under the relative hire-purchase agreement and not due at the date of assignment, and the amount of each instalment is to be the difference between the amount payable by the hirer in respect of the corresponding instalments of rent and the amount of the bill of exchange to be delivered by the dealer to the company pursuant to clause 12, and such instalments of the purchase price are to be payable by the company to the dealer on the same dates on which the corresponding instalments of rent are payable by the hirer under such hire-purchase agreement.

It cannot be said that the latter part of clause 10 is easy to translate, but the meaning is this, that 25 per cent. of the purchase price (or whatever be the percentage left after making the payment payable forthwith on the receipt of the documents mentioned in clause 8) is to be paid by a series of instalments, the amount of each being paid by dividing the 25 per cent. by the number of instalments payable by the hirer after the date of assignment.

Mr. Atkinson's concrete case clears away much of the obscurity. He takes the case of a hirer of furniture rented at 10*l.* per month for twelve months who has paid two months' rent at the date of assignment. The purchase price to be paid by the company for that agreement would be 100*l.*, representing the ten instalments which still remain to be paid. Of this purchase price 75*l.* would be paid on the date of assignment, the remaining 25*l.* would be divided by the number of outstanding instalments, ten, and 2*l.* 10*s.* would be thereby paid as the amount of each monthly instalment payable by the company in discharge pro tanto of the 25 per cent. of the purchase price. These monthly instalments of the purchase price were to be payable by the company to the dealer on the same dates as those on which the corresponding instalments of rent were payable by the hirer under such hire-purchase agreement, so that in the concrete case I have mentioned the dealer would each month collect 10*l.* from the hirer, hand over 7*l.* 10*s.* to the company, and retain 2*l.* 10*s.* on account of the purchase price.

By clause 14 of the contract, the company agreed that until the happening of one of the events specified in clauses 19 and 20, in other words, until breach of the hiring agreement on the part of the hirer, or breach of this agreement by the dealer, the company would not give notice to the hirer of the goods comprised in any hire-purchase agreement assigned to the company under the terms of the agreement of the purchase of such goods by the company, or of the assignment to the company of the hire-purchase agreement relating thereto, and would allow the dealer to collect as agent of the company the several instalments of rent from time to time payable by the hirer under such hire-purchase agreement, the net result of this clause and the remaining portion of clause 16 being that 25 per cent. of the purchase price was left to be collected by the dealer by instalments spread over the period between the date of assignment and the expiry of the hiring agreement. By these means the company avoided the necessity of finding any part of this 25 per cent. of the purchase price. To revert to Mr. Atkinson's concrete example: the company was never under any liability to produce the 25*l.* Their liability was to be discharged by the dealer retaining out of each of the ten instalments he collected from time to time the sum of 2*l.* 10*s.*, 25 per cent. of 10*l.*, in discharge pro tanto of unpaid purchase money. Nor was the 75 per cent. of the purchase price payable in respect of the documents specified in clause 8 altogether free from unusual incidents. Amongst the documents specified in clause 8 are mentioned "Bills of exchange drawn as provided in clause 12 hereof and duly accepted by the dealer." By clause 6 it is provided that with every notification of acceptance the company will forward these bills of exchange to the dealer for acceptance by him, and by clause 12, in consideration of the undertaking given by the company so long as there is no breach of the hiring agreement or this agreement not to give notice to the hirer of the purchase or assignment, the dealer guarantees to the company the payment by the hirer under every hire-purchase agreement assigned to the company thereunder of the several instalments of rent payable thereunder on their due dates, and for the purpose of partly securing the payments to the company of the said instalments of rent the dealer is to accept and deliver to the company bills of exchange amounting in the aggregate to the first payment payable by the company in respect of the goods to which such agreement relates, the number of bills in respect of each hire-purchase agreement to be equal to the number of instalments of rent payable thereunder and not due at the date of assignment thereof but not to exceed twenty-four, and each bill to be dated seven days after the date on which the corresponding instalment of rent is due, the bills to be accepted by the company as collateral only and not to be considered until payment thereof as discharging any liability of the dealer under the agreement.

Referring once more to the concrete case to illustrate the procedure under clause 12, it comes to this, that on the date of assignment the dealer will hand to the company ten acceptances of 7*l.* 10*s.* each payable seven days after the respective dates on which the instalments for rent are payable, the difference between the 7*l.* 10*s.* and the 10*l.* instalment being the 2*l.* 10*s.* retained by the dealer in part payment of 25 per cent. of the purchase money.

Pausing here and treating this document as a contract of sale between vendor and purchaser, what are their respective positions when completion takes place ? The purchaser has entered into a contract to purchase a number of sums of money payable in instalments over various periods and to pay a purchase price which is exactly equivalent to the aggregate amount of all such sums. Prima facie that is a contract out of which he can make nothing, but this result is averted by the introduction into the contract of clause 11, whereby it is provided that the purchaser shall be entitled to deduct from the first payment of the purchase price a " finance charge " at the company's rate for the time being in force. The rate of this finance charge may be changed by the company from time to time, but no change in the rate shall be effective as against the dealer until notice thereof in writing shall have been given by the company to the dealer.

The vendor parts with the whole of his interest in the chattels the subject of the hiring agreements and in the hiring agreements, he receives 75 per cent. of the purchase price less the finance charge, agrees to accept payment of the remaining 25 per cent. by equal instalments spread over periods corresponding with the duration of the respective hiring agreements, guarantees to the purchaser the payment by the hirer under every hire-purchase agreement assigned to the company of the several instalments of rent payable thereunder on their due dates, delivers to the purchaser his acceptances for amounts equivalent to 75 per cent. of all such instalments, and agrees during the continuance of the agreement that he will not, without the consent in writing of the purchaser, enter into any other financing arrangements with regard to the letting on hire-purchase terms of goods dealt in by him.

It is difficult to reconcile these relative positions with the ordinary ones of vendor and purchaser. The purchaser, if the arrangement is worked out, makes no profit out of the subject-matter of the sale, for he pays just as much as he receives, and his sole profit is represented by the finance charge, the rate of which is not disclosed in the documents. The vendor parts with his property for a payment of 75 per cent., less the finance charge, of its value, guarantees that it will realize its full book value, and binds himself so long as the agreement is subsisting not to resort elsewhere for making financial arrangements.

I do not think it is possible to regard this document as a contract of sale and purchase. Its true nature is, I think, disclosed by clause 18, whereby it is provided that: "after the company shall have received from the hirer or the dealer in respect of all the hire purchase agreements comprised in any assignment to the company payment (either by way of instalments of rent payable under any hire purchase agreement or by way of purchase price payable on the early exercise of the option to purchase contained therein or otherwise) of sums to an aggregate amount equal to the aggregate amount of the purchase price, together with all other sums (if any) then due to the company for interest, damages, costs and expenses under such agreements, the company shall allow the dealer to retain all subsequent instalments of rent or other moneys (if any) due from the hirer under such agreements, and shall account to the dealer for all such sums in excess of the said amount as may be received by the company." The provisions of that clause are inconsistent with the idea of a sale, but wholly consistent with the assignment being in the nature of a charge.

In my opinion, according to the true construction of this document, it is a charge upon the future instalments payable under the hire-purchase agreements to which it relates to secure the advance of a sum equal to 75 per cent. of such future instalments. The interest on the advance is provided for by the finance charge, the personal covenant is replaced by the guarantee, and the equity to redeem is wrapped up but not wholly concealed in clause 18. The third deed to which I referred at the beginning of my judgment is the assignment by which the chattels comprised in the hire-purchase agreements and the full and exclusive benefit of and all rights in and remedies under such agreements were vested in the respondents. It is one of the steps in the transaction but does not call for any further comment.

Upon the further points raised on behalf of the respondents, I entertain no doubt. The rentals reserved under the hire-purchase agreements, though in certain events subject to defeasance, are book debts of the company, and the transaction is one which comes within the mischief of s. 79 of the Companies Act, 1929. The liquidator is, in my opinion, entitled to the relief he claims, and the costs must be paid by the respondents.

H. L. L.

C. A.

The discount company appealed. The appeal was heard on May 25 and 30 and June 8 and 9. The argument relating to the question whether, if the agreement between the discount company and the dealer created a charge, the charge on instalments payable under the hire-purchase agreements was a charge on book debts within s. 79, sub-s. 2 (*e*), of the Companies Act, 1929, is not set out, as no decision was given on this point.

Cyril Atkinson K.C. and *W. N. Stable* for the appellant company. The agreement between the dealer and the discount company was for a sale and purchase of the furniture comprised in certain hire-purchase agreements subject to and with the benefit of those agreements. There is no ground for holding that it created a charge so as to require registration under s. 79 of the Companies Act, 1929. Thus the dealer had no conceivable right under the agreement to get the furniture back in any circumstances whatever; and similarly the dealer was under no liability to repay to the discount company any part of the purchase money. The dealer's only liability was as guarantor of the payment of the instalments due under the hire-purchase agreements.

In arriving at the contrary conclusion Eve J. relied largely on clause 18 of the agreement, but in doing so he gave clause 18 a far wider meaning than on its true construction it bears. That clause deals only with the circumstance of the discount company receiving from the hirer or the dealer sums exceeding the aggregate amount of the purchase money. As the purchase money is exactly the aggregate sum remaining payable under the hire-purchase agreements comprised in it, this over payment can only occur by the dealer paying an instalment upon the default of the hirer under his guarantee, and then the hirer in ignorance of this paying the discount company the same instalment. This might happen, because on a default the discount company was entitled at once to give notice to the hirer of the assignment to him. In such a case it would be only right that the discount company should refund to the dealer the sum paid under the guarantee. That right of recoupment is conferred on a guarantor by the Mercantile Law Amendment Act, 1856, s. 5, and clause 18 is really cutting down the guarantor's right under that section by providing for repayment only after the discount company has received payment of an aggregate amount equal to the aggregate amount of the purchase price together with all other sums, if any, due for interest, damages or costs.

The Court has to look to the substance of the transaction to be derived from the language of the agreement: *North Central Wagon Co.* v. *Manchester, Sheffield, and Lincolnshire Ry. Co.* (1); *Helby* v. *Matthews.* (2) When this is done it becomes clear that the dealer is given no right to get back the furniture in any circumstances, and the purchase price is payable in any and every circumstance. If there is a default by a hirer, the discount company still has to pay the purchase price and must look to the furniture for recoupment, bearing the burden of any resulting loss and taking the benefit of any resulting profit. The mere fact that the dealer guarantees the payment of the instalments due under the hire-purchase agreements does not prevent the transaction from being one of sale and purchase.

Eve J. spoke of clause 18 as showing that there was an equity of redemption. How can that be so? Not a word is said about redeeming the furniture or the instalments payable under the hiring agreements.

(1) (1887) 35 Ch. D. 191.

(2) [1895] A. C. 471.

Clayton K.C. and *Wilfrid Hunt* for the liquidator. If the agreement in question is to be treated as valid, although not registered in accordance with s. 79 of the Companies Act, 1929, that section will be deprived of much of its usefulness. The whole object of this complicated agreement is the evasion of that section. In bankruptcy, if goods that the bankrupt has disposed of are left in his possession, order or disposition, the property in the goods passes to his trustee in bankruptcy. This is for the protection of creditors, and s. 79 is intended to give a like protection to creditors of a company. Under the agreement in question the change in ownership of the furniture and instalments payable under the hire-purchase agreements is secreted, and to hold such a transaction good would be to defeat the whole aim of s. 79.

[LAWRENCE L.J. The bankruptcy rule as to property remaining in the possession, order and disposition of the bankrupt was not introduced into the winding-up of companies.]

Sect. 79 was substituted and intended to give a like protection to persons giving credit to a company.

The agreement between the dealer and the discount company has, as its sole object, the financing of the dealer. That is shown by the use of the expression "finance charge," which is wholly inappropriate to a sale. A person who is buying property does not fix a purchase price and then deduct a percentage from it. Again, the provision against notice being given of the assignment until after default is a common clause in a mortgage deed, but entirely inappropriate to a sale.

Regard must be had to the substance of the transaction and not to its form, just as in cases where the Court has to decide whether a document ought to have been registered as a bill of sale: *In re Watson* (1); *Madell* v. *Thomas & Co.* (2); see also *Motor Trade Finance, Ld.* v. *H. E. Motors, Ld.* (3) Looked at in this way the agreement in question is clearly a charge. The discount company is a finance company and not a furniture dealer, and it is foreign to its object to enter into contracts to purchase furniture. The essence of the agreement is that under it the dealer obtains at once 75 per cent. of the sum due in instalments under the hire-purchase agreements, less a discounting payment. The balance of 25 per cent. is never really paid, but is set-off by means of a book-keeping entry.

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(1) (1890) 25 Q. B. D. 27.

(2) [1891] 1 Q. B. 230.

(3) Unreported.

[Lord Hanworth M.R. referred to *Yorkshire Ry. Wagon Co.* v. *Maclure.* (1)]

It is conceded that if, owing to the need to register a charge, the transaction had been altered into a bona fide sale, it would be perfectly good. But if the true effect of the document is to carry out a loan under the form of a sale, the form will be ignored.

The complicated provisions of this agreement would have been quite unnecessary for an out-and-out sale. Clause 18 is in effect a proviso for redemption and has not the limited meaning suggested.

[No reply was called for.]

Lord Hanworth M.R. This is an appeal from a decision of Eve J. given upon an originating summons taken out by the liquidator of George Inglefield, Ld., asking that it might be declared that the assignments to, and agreements with, the respondents, the Industrial Discount Company, affecting, or purporting to affect, goods of George Inglefield, Ld., and sums due, or to become due, to the company as hirers of such goods under hire-purchase agreements, were void as against the applicant as liquidator and the creditors of George Inglefield, Ld., for want of registration under s. 79 of the Companies Act, 1929, or the earlier s. 93 of the Companies (Consolidation) Act, 1908. The section that we have to consider, for the two actions are substantially the same, is now s. 79 of the Companies Act, 1929, which requires registration of charges created by companies registered in England. The allegation made by the liquidator of George Inglefield, Ld., is that certain sums which became due under hire-purchase agreements were charged to

(1) (1882) 21 Ch. D. 309.

the discount company by George Inglefield, Ld., and that the charge ought to have been registered, and in default of registration is void as against the liquidator.

I need not recount all the facts, or state the full effect of the documents, for they have been stated and explained fully and accurately in the judgment of Eve J. George Inglefield, Ld., were a company carrying on business in furniture, and from time to time they made what are called hire-purchase agreements with their customers, and for the purpose of obtaining money they entered into a contract with the discount company, whereby that company agreed to make certain payments to them. The argument that was presented on behalf of the liquidator was that, by whatever method or documents the transaction purported to be carried out, it really was a transaction of charge to the discount company and of a loan to George Inglefield, Ld., upon a security which the latter company placed under the dominion of the discount company, while retaining what amounts to an equity of redemption; and that it was not therefore an absolute assignment to the discount company but was, in truth and in effect, a charge.

It is old law, and plain law, that in transactions of this sort the Court must consider whether or not the documents really mask the true transaction. If they do merely mask the transaction, the Court must have regard to the true position, in substance and in fact, and for this purpose tear away the mask or cloak that has been put upon the real transaction. In *Helby* v. *Matthews* (1) Lord Herschell states the principle that we have to follow in the opening sentences of his speech (2): "My lords, it is said that the substance of the transaction evidenced by the agreement must be looked at, and not its mere words. I quite agree. But the substance must, of course, be ascertained by a consideration of the rights and obligations of the parties, to be derived from a consideration of the whole of the agreement," and Lord Macnaghten and the other learned lords express the same opinion. In the present case we have three documents to consider. The first is what is

(1) [1895] A. C. 471.

(2) [1895] A. C. 475.

called the hiring agreement under which George Inglefield, Ld., let out to a hirer certain furniture, and for that hiring the hirer pays a sum down and a monthly rent. It is in the form known as the *Helby* v. *Matthews* (1) form; that is to say, it does not contain any immediate contract on the part of the hirer to purchase the goods. There is only a contract on his part to pay for the hire so long as the hiring continues, but there is a subsequent clause whereby if and when payment has been made for the hire to the full extent of the value placed on the goods, the property in the furniture loaned passes out-and-out to the hirer. In *Helby* v. *Matthews* (1) it was determined that, for the purpose of the Factors Act, such a contract was not one where a person had bought, or agreed to buy, goods; it was a contract of hiring.

The benefit of that contract was vested by George Inglefield, Ld., in the discount company in these circumstances: an agreement was entered into, elaborate in its terms, between the Industrial Discount Company and George Inglefield, Ld., the effect of which was that George Inglefield, Ld., assigned to the discount company the goods which were the subject-matter of the hiring agreement, together with the rights which George Inglefield, Ld., had as against the hirer under the contracts of hiring. There is a document before us carrying out this assignment. It recites that George Inglefield, Ld., have entered into the hire-purchase agreements specified in the schedule, and that there was an agreement by the discount company to purchase from George Inglefield, Ld., the goods comprised in such hire-purchase agreements. The operative clause is that George Inglefield, Ld., sell to the discount company the property in these goods and the full and exclusive benefit of all rights and remedies under the hire-purchase agreements. Ex facie, that is an absolute assignment to the discount company of the furniture and all the rights in respect of the furniture held by George Inglefield, Ld.

We are asked to hold that, on examination of the true agreement between George Inglefield, Ld., and the discount

(1) [1895] A. C. 471.

company, it will be found that all that George Inglefield, Ld., did was to give a charge to the discount company. There was no evidence before Eve J. that the real agreement was wholly different from that recorded. There was no evidence such as was available in *North Central Wagon Co.* v. *Manchester, Sheffield, and Lincolnshire Ry. Co.* (1), where an independent contract was proved apart from the documents which stood when the documents might otherwise have been invalid for want of registration as a bill of sale. We have, therefore, to look at these written documents as containing the contracts made between the parties, and we cannot ignore them on the ground that, apart from those documents, some other agreement has been made between the parties. That being so, we have, as Lord Herschell said in *Helby* v. *Matthews* (2), to look at the documents to ascertain the substance of the transaction, and see what are the rights and obligations of the parties to be derived from the consideration of the whole agreement as recorded. There is no clause in the agreement between George Inglefield, Ld., and the discount company which appears to reserve to George Inglefield, Ld., any reversion or equity of redemption. On a careful examination of the clauses of the agreement, they seem consistent only with an out-and-out assignment to the discount company.

Attention has been drawn to the fact that, ex facie, the discount company would seem to be making no profit in the transaction, although it is undoubtedly a business transaction. The device by which profit is earned by the discount company is to be found in clause 11, and it is by a deduction of a finance charge from the first payment on account of the purchase price. Such an expression, say the respondents, savours of a mortgage or charge to the discount company, and not of an out-and-out assignment. In one or two other places reference is made in the agreement to this finance charge, and it is contended that its imposition is some indication of the transaction being one of charge, and of charge only. Eve J. found in clause 18 a factor which was consistent, to his mind, only with the transaction being one of charge, but when the clause is examined and understood it seems impossible to attribute such an effect to it. It provides that after the discount company shall have received from the hirer, or the dealer (that is George Inglefield, Ld.), in respect of all the hire-purchase agreements comprised in the assignment, sums amounting in the aggregate to the purchase price paid by the discount company under the terms of the assignment, that company is to allow the dealer to retain all the subsequent instalments of rent, or other moneys, if any, due from the hirer, and shall account to the dealer for all such sums. If then one approaches clause 18 without any prejudice, either one way or the other, it really amounts to no more than that when the discount company have been paid more than they are entitled to receive under the assignment to them of the benefit of the hire-purchase agreements, they will pay the excess to George Inglefield, Ld. That is because the discount company are not entitled to retain payments in excess of those to which they were entitled under the hire-purchase agreements. I cannot find from that clause any sufficient ground for treating this assignment as a charge.

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(1) 35 Ch. D. 191. (2) [1895] A. C. 475.

It is well to remember, and, indeed, Eve J. has been careful to point it out, that we ought not to approach these agreements with a sinister view, and he quotes the words of Lord Macnaghten in *Helby* v. *Matthews* (1) to the effect that persons who are competent to form an opinion may be allowed to make what agreements they please. Lord Macnaghten said (2): "I do not see why a person fairly solvent and tolerably prudent should not make himself the owner of a piano or a carriage or anything else by means of periodical payments on such terms as those in question in the present case. The advantages are not all on one side." I certainly agree with Eve J. in following the caution administered by Lord Macnaghten.

Our attention was called to a decision given in the House of Lords, and also in this Court, in *Motor Trade Finance, Ld.* v. *H. E. Motors, Ld.* (3) In giving my judgment when the matter was in this Court I called attention to the fact that there was in the documents then before the Court a provision for grouping together a number of transactions of hire-purchase, and that there followed an agreement that if there should be any default in the punctual payment by the defendants of any sum due under any of the hire-purchase agreements, or if the defendant should commit, or suffer to be committed, any breach whatever of any of the hire-purchase agreements, or of any term or condition contained in any of them, the plaintiff should be entitled to determine the hiring forthwith, and to resume possession of all, or any, of the cars the subject of all or any of the agreements, and to determine all, or any, of the agreements. That was a very significant clause, for it gave the so-called lender power upon some small default being made by the hirer to swoop down not merely on the particular motor-car, or other subject-matter of a hire-purchase agreement, but upon all the articles which were the subject-matter of the group of agreements. There is no such clause here. I think that we must bear in mind, when asked to attribute to this transaction something different from its apparent nature, that in *Helby* v. *Matthews* (1) the Court of Appeal had found, reversing the decision of the Divisional Court, that the transaction was one in which there was a contract of sale to be spelt out of the document but subject to a possible defeasance. The House of Lords took the document as it stood, and held that it was not to have attributed to it some meaning different from that which appeared on the face of it, and, ex facie, it provided only for hiring, and not for a sale during its continuance. In *Yorkshire Railway Wagon Co.* v. *Maclure* (2), that came before Sir George Jessel and Lindley L.J. in the Court of Appeal, the parties set out to do what they had no power to do. They set out to carry through a transaction of borrowing by a loan, but, on receiving advice that the transaction could not be carried through in this way, they devised a method whereby there was an immediate payment which was, in a sense, the loan that they sought, and a repayment by means of a hiring at a rent. Lindley L.J. said (1): "The original idea was bona fide dropped and another method was had recourse to, not for effecting the loan, but for effecting a different transaction, which would answer the purpose of the Railway Company just as well. All they wanted to do was to get the 30,000*l.* That was the real transaction between the parties, and that transaction was one which was embodied in the deeds upon which this action is brought. If we look on that transaction as the real transaction, upon what ground can we treat it as illegal?" I call attention to those two cases as showing that although it had been argued, and indeed held in the one case by the Court of Appeal, and in the other case by the Court of first instance, that the transaction was one in which the documents masked the true transaction, yet the higher Court held that the transactions revealed by the documents in the two cases were to be considered upon their merits, and, when so considered, were legitimate.

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(1) [1895] A. C. 471.

(2) [1895] A. C. 482.

(3) Unreported.

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(1) [1894] 2 Q. B. 262; [1895] A. C. 471.

(2) 21 Ch. D. 309.

I have therefore to consider these documents as they stand, treating them fairly, and approaching them without a sinister desire to impute to them something which they do not contain. I find that they are documents which provide for a hiring in the *Helby* v. *Matthews* (2) form to the hirer, with the consequence that there are recurrent payments to be made to the dealer, and under which the dealer obtains from the discount company by way of purchase money a more immediate payment than he would obtain from the hirer of a sum amounting to 75 per cent. of the sum to be received under the hiring agreement. There is nothing improper or wrong in obtaining money in this way any more than there is in going to your banker and obtaining money upon documents. There are, no doubt, provisions, such as that in s. 79, which require a charge to be registered, but if you enter into a transaction outside these provisions which require registration as a condition of validity, you are unaffected by the law. It is not a question of evasion. A transaction is either within or without the law, and malice is not to be attributed to a person who so carries out a transaction that it remains outside the law.

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(1) 21 Ch. D. 318.

(2) [1895] A. C. 471.

In the present case I do not find in the documents before us a means of determining that the transaction was one of charge, and not an assignment out and out. Following the principles which have been laid down in the cases to which I have referred, there being no evidence of any transaction outside, or different from, these documents, we must take the documents as showing the true transaction, and, doing that, I find that this transaction was one of assignment to the discount company, and not merely one of charge. That being so, it becomes unnecessary to discuss other and subsidiary points which have arisen. Those matters might have been material if we had had to consider whether sub-s. 2 (*e*) of s. 79 applied, but inasmuch as this transaction is not one of charge, no part of s. 79 can apply.

For these reasons the appeal from Eve J. must be allowed.

LAWRENCE L.J. I agree. In the first place, it is necessary to bear in mind that in this case no evidence was adduced to show that the transaction as recorded in the documents which the Court is asked to construe did not contain a true record of the transaction entered into by the parties, and therefore the only question which the Court has to consider is whether the substance of the transaction so recorded is one of sale and purchase, or is one of loan and charge. In the next place it is well to bear in mind that, although the Legislature has been careful to safeguard all persons having dealings with a limited company by providing for the registration of any charge which such a company may create on its assets, the Legislature has not introduced the doctrine of reputed ownership into the winding-up of companies. As the law stands at present, there is nothing to prevent a limited company from selling its assets without giving notice of that sale to the public or to any one else, remaining in possession of the assets so sold, with the consent of the buyer, and obtaining credit on the faith of that possession. If such a state of things ought to be remedied it is for Parliament to supply the remedy. All that the Court has to do, in circumstances such as those to which I have referred, is to ascertain whether there has, in fact, been a sale of the assets, and to give effect to the transaction if that be the case.

In the present case Eve J. has rightly directed his attention to the consideration of the real question—namely, what is the substance of the bargain as disclosed by the documents before the Court ? The learned judge, after carefully reviewing the contents of the relevant documents, has come to the conclusion that the agreement between the discount company and the liquidating company, on its true construction, constitutes a charge upon the future instalments payable under the hire-purchase agreements to which it relates to secure an advance of a sum equal to 75 per cent. of such future instalments. The learned judge has based his decision mainly upon the provisions of clause 18 of the agreement, in which clause he considers that there is wrapped up, but not wholly concealed, an equity of redemption. But for the existence of clause 18 I do not think that it could reasonably be contended that the agreement discloses a transaction of loan and charge. The substance of the agreement, as I understand it, is that the liquidating company sells out and out to the discount company the furniture comprised in certain hiring agreements, together with the benefit of the instalments payable by the hirers under those agreements, coupled with a guarantee by the liquidating company that the hirers will pay in full all the instalments which may become payable under those hiring agreements, that guarantee being collaterally secured by the appropriate bills of exchange accepted by the liquidating company. The stipulation in the agreement that the discount company is to be entitled to charge what is called a finance charge, and the stipulation that no notice of the sale is to be given to the hirers, except under certain conditions, and, further, the stipulations contained in clause 18 make it encumbent upon the Court to look very narrowly into the agreement in order to see whether it is, in fact, an agreement for a charge under the guise of an agreement for an absolute sale.

Having stated my view of the effect of the agreement, it only remains for me to consider what is the effect of clause 18. With the greatest respect for the opinion of the learned judge, I do not agree with his view that it partially conceals an equity of redemption. As I understand that clause, it is intended to provide for a case which may well happen of the discount company receiving payment of an instalment due under the hiring agreement, both from the hirer and from the guarantor. If the discount company were to receive such a double payment, then it is obvious that under s. 5 of the Mercantile Law Amendment Act the guarantor would be entitled to repayment of the sum which it had paid under its guarantee, and, further, directly the liquidating company had paid any sum under its guarantee it would be entitled to stand in the shoes of the discount company in respect of the sum which it had so paid, and have all the rights of the discount company in respect of the instalments which had not been paid by the hirer. In those circumstances we come to clause 18. The effect of that clause, stated shortly, as I interpret it, is that if the discount company receives payment both by the hirer and by the liquidating company under its guarantee, the liquidating company is not immediately to have its rights under s. 5 of the Mercantile Law Amendment Act—namely, to enforce its right to repayment, or to enforce its right against the hirer, but the discount company is to be at liberty to retain such a double payment until it has received the total amount payable under the hiring agreement, and further, if the agreement in respect of which such a double payment has been made is one of a group of agreements comprised in a single assignment, the liquidating company is to have no right to receive, or to enforce, its rights as guarantor until the discount company has received the total amounts payable under all the agreements comprised in that assignment. When the discount company has received the full amount payable in the first case, it has to account to the liquidating company for any surplus received by it, and, in the second case, when it has received all the payments that ought to have been made under the group of hiring agreements comprised in one assignment, it has to account to the liquidating company for any surplus; and in both cases, after the discount company has received the full amount it is entitled to, the liquidating company, in order to recoup itself in respect of the payments it has made under its guarantee, is entitled to receive the future instalments from the hirers. If that be the true view of clause 18, it does not amount to an equity of redemption in any sense of the word.

As regards the two other minor matters which I have mentioned, that is to say, the finance charge, and the stipulation that no notice should be given, although they may make it necessary to exercise caution in arriving at a conclusion as to the real nature of the whole transaction, they are not of themselves sufficient to constitute the agreement a charge. I concur therefore with the Master of the Rolls in the view that this agreement is not a charge within the meaning of s. 79 of the Companies Act, and, having arrived at that conclusion, it is unnecessary to decide the further question whether the instalments payable under the hiring agreements are book debts within the meaning of sub-s. 2 (*e*) of s. 79, and I prefer not to express any opinion upon that point.

Romer L.J. I have come to the same conclusion. Mr. Clayton warned us that if we decided this appeal in favour of Mr. Atkinson's clients we should be enabling them to evade, and I think he also said defeat, the Act of Parliament in question. If a man so conducts his affairs that he places himself outside the operation of an Act of Parliament, he cannot be said to be either evading it, or defeating it. He has done nothing that is unlawful, and he has done nothing that calls for adverse comment from the Court. In fact I think that Mr. Clayton meant no more than that the transaction that we are investigating in the present case is within what is called the mischief of s. 79 of the Companies Act, because to a man who might be thinking of giving credit to a dealer in ignorance of this transaction it would be just as harmful as would an unregistered mortgage. If that be so, and for myself I think that it is, that may afford a very good ground for interference by the Legislature, but it affords no reason whatever for attempting to drag the transaction within the operation of the section by calling it something which, in truth, it is not.

The only question that we have to determine is whether, looking at the matter as one of substance, and not of form, the discount company has financed the dealers in this case by means of a transaction of mortgage and charge, or by means of a transaction of sale ; because, of course, financing can be done in either the one way or the other, and to point out that it is a transaction of financing throws no light upon the question that we have to determine.

It appears to me that the matter admits of a very short answer, if one bears in mind the essential differences that exist between a transaction of sale and a transaction of mortgage or charge. In a transaction of sale the vendor is not entitled to get back the subject-matter of the sale by returning to the purchaser the money that has passed between them. In the case of a mortgage or charge, the mortgagor is entitled, until he has been foreclosed, to get back the subject-matter of the mortgage or charge by returning to the mortgagee the money that has passed between them. The second essential difference is that if the mortgagee realizes the subject-matter of the mortgage for a sum more than sufficient to repay him, with interest and the costs, the money that has passed between him and the mortgagor he has to account to the mortgagor for the surplus. If the purchaser sells the subject-matter of the purchase, and realizes a profit, of course he has not got to account to the vendor for the profit. Thirdly, if the mortgagee realizes the mortgage property for a sum that is insufficient to repay him the money that he has paid to the mortgagor, together with interest and costs, then the mortgagee is entitled to recover from the mortgagor the balance of the money, either because there is a covenant by the mortgagor to repay the money advanced by the mortgagee, or because of the existence of the simple contract debt which is created by the mere fact of the advance having been made. If the purchaser were to resell the purchased property at a price which was insufficient to recoup him the money that he paid to the vendor, of course he would not be entitled to recover the balance from the vendor.

In this case the subject-matter of the mortgage or charge, or of the sale and purchase, whichever it be, is certain furniture subject to, and with the benefit of, the hiring agreements. If one considers the documents, which I do not intend to go through again, in relation to the three matters that I have mentioned, it will be found that in every one of those three respects the documents bear the attributes of a sale and purchase, and not the attributes of a mortgage or charge.

For these reasons, with great respect to the learned judge, I have come to the conclusion in this case that the financing has been done by a sale and purchase, and not by a mortgage or charge, and, accordingly, that it is not invalidated by non-registration by reason of s. 79 of the Companies Act.

On the question whether, if we had arrived at a different conclusion upon that point, the mortgage or charge would have been one of book debts of the company I express no opinion at all.

Appeal allowed.

Solicitors: *Slaughter & May; Reynolds & Miles.*

H. C. G.

LS, *Re.* ([1933] Ch. 29; 148 L.T. 5). *Applied. Re* STRATHBLAINE ESTATES, LTD. .. .. .. [1948] 1 All E.R. 162

Also [1948] 1 Ch. 228.

In re SIR THOMAS SPENCER WELLS.

SWINBURNE-HANHAM *v.* HOWARD.

[1931. W. 43.]

C. A.
1932
May 26, 27, 30;
July 18.

Crown—Bona Vacantia—Mortgage by Company of Leaseholds by Assignment—Dissolution of Company before 1929*—Claim of Crown to Equity of Redemption allowed—Companies Act,* 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *s.* 296.

A company in 1899 mortgaged certain leasehold properties by the assignment of the residue of the terms to the mortgagees, subject to a proviso for redemption. In 1910 the company was wound up voluntarily and a liquidator was appointed. In 1916 the company was dissolved. The mortgagees had in 1913 appointed a receiver of the rents, but at that time the net rents were insufficient to pay the full interest on the mortgage. The liquidator considered that the equity of redemption was of no value and did not either surrender it to the mortgagees or part with it to any other person. The rents had now largely increased in value and the arrears of interest had been paid off, and the equity of redemption had become of value. The Crown claimed the equity of redemption as bona vacantia, and the mortgagees claimed that they were entitled to the property free from any right to redeem:—

Held (reversing the decision of Farwell J.), that the doctrine of bona vacantia extended to leaseholds, that the equity of redemption in the mortgaged premises passed to the Crown as bona vacantia on the dissolution of the company, and that the Crown was therefore entitled to a declaration to that effect.

Middleton v. *Spicer* (1783) 1 Bro. C. C. 201; *Dyke* v. *Walford* (1846-48) 5 Moo. P. C. 434; *Megit* v. *Johnson* (1780) 2 Dougl. (K. B.) 542; and *Taylor* v. *Haygarth* (1844) 14 Sim. 8 applied.

Obiter dictum of Wright J. in *In re Higginson & Dean* [1899] 1 Q. B. 325, 332, that it would " be judicial legislation to declare the Crown entitled to maintain actions in such cases except where it can allege a trust," dissented from.

Hastings Corporation v. *Letton* [1908] 1 K. B. 378 discussed and distinguished.

Held, also (affirming the decision of Farwell J.), that s. 296 of the Companies Act, 1929, is not retrospective.

APPEAL from a decision of Farwell J. (1)

Sir Thomas Spencer Wells, by his will dated November 19, 1896, after making various bequests, devised and bequeathed to his executors and trustees the residue of his real and personal estate upon trust to invest certain shares thereof upon the securities therein mentioned, including freehold,

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(1) [1932] 1 Ch. 380.

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copyhold, leasehold and chattel real securities in Great Britain, but not in Ireland, and to hold such investments upon the trusts therein declared, which were still subsisting.

The testator died on January 31, 1897, and the will was duly proved in the Principal Probate Registry on March 30, 1897.

The trustees of the will invested the sum of 4325*l.*, being part of the said trust shares, upon a mortgage of three leasehold properties, known as Nos. 3, 4 and 5 St. John's Park Mansions, Pemberton Gardens, in the county of London, which were then vested in the Tufnell and Caledonian Parks Syndicate, Ld. (hereinafter called "the company"), for the respective terms of ninety-nine years from June 24, 1868 (less the last three days thereof), by three underleases, one dated April 25, 1899, and the others dated July 3, 1899, at the yearly rent for each property of 80*l.* By the mortgage dated October 31, 1899, the company covenanted with the trustees to repay the said sum of 4325*l.* with interest thereon at the rate of 4*l.* per cent. per annum, and assigned to the trustees the said three properties for the whole of the unexpired residue of the terms for which the same were respectively held, subject to the usual proviso for redemption.

On March 23, 1910, the company passed an extraordinary resolution that the company should be reconstructed by a sale and transfer of its property, assets and liabilities to a new company, and that the company should be wound up, and that Llewellyn Howard Wilkins should be appointed liquidator. The extraordinary resolution was duly confirmed by resolution on April 7, 1910.

In July, 1913, the trustees gave notice to the liquidator to pay off the mortgage money, but default was made in payment. In December, 1913, the trustees appointed Claude Lound receiver of the income of the mortgaged property, and he entered into possession of the rents and profits. From the accounts rendered by the receiver it appeared that after payment of the ground rents and other outgoings a very small balance of the rents came to the hands of the trustees and was not sufficient to satisfy the interest.

The company was never reconstructed, nor was any sale or transfer made to any new company, and on May 24, 1916, the company was dissolved. At the time of the dissolution the liquidator was of opinion that in the circumstances the equity of redemption of the mortgaged premises was of no value, and he took no steps either to surrender the equity of redemption to the mortgagees or to sell or dispose of it to any other person. The said Claude Lound continued to act as receiver of the income of the mortgaged premises until 1921, when the mortgagees appointed Percy Lawrence to act as receiver in his place. At the time of the dissolution of the company there was a substantial sum due to the mortgagees in respect of interest, which the net rents had been insufficient to meet. Since the dissolution the rents of the mortgaged premises had largely increased, with the result that net rents received had been sufficient to pay the current interest and all arrears of interest, and to leave a balance in the hands of the receiver. The equity of redemption in the mortgaged premises had therefore become of value. Questions then arose as to the persons entitled to the equity of redemption, and the Crown claimed to be entitled to it as bona vacantia, while the surviving trustee claimed that in the circumstances no one was entitled to redeem the property, and that he, as survivor of the mortgagees, to whom the property had been assigned, was entitled to it free from any equity of redemption.

The surviving trustee, therefore, issued this summons, to which one of the beneficiaries and the Attorney-General, representing the Crown, were parties. The summons came before Eve J. on April 17, 1931, and as at that time no definite information had been obtained as to the circumstances of the dissolution of the company, his Lordship directed an inquiry in the following terms: "Whether the company was reconstructed under s. 192 of the Companies (Consolidation) Act, 1908, or otherwise, and whether any and what property of the company was sold or transferred to any other company or person on the terms of the scheme of reconstruction mentioned in the extraordinary resolution of the company or on any and what terms." The summons then stood over. The former liquidator of the company was afterwards found, and made an affidavit giving the facts of the dissolution as before mentioned, and the Master made his certificate accordingly.

The summons was then restored to the list for hearing.

Farwell J. held, on the authorities, that the Crown could claim as bona vacantia property in the hands of another person only if that person held it under some trust for a legal entity; that the mortgagee was not a trustee of the equity of redemption for the mortgagor; that the Crown's claim failed and that the surviving mortgagee was owner of the mortgaged terms without any right in any person to redeem. He further held that s. 296 of the Companies Act, 1929, was not retrospective.

C. A. The Crown appealed. The appeal was heard on May 26, 27 and 30, 1932.

Sir Boyd Merriman S.-G. and *Stafford Crossman* for the Crown. The equity of redemption in the mortgaged property passed to the Crown as bona vacantia when the company in which the equity was vested was dissolved on May 24, 1916. It is true that the receiver appointed by the mortgagees continued to act, but under s. 24 of the Conveyancing Act, 1881, the receiver when appointed was the agent of the company as mortgagor and on the dissolution of the company must be treated as having become the agent of the Crown. If therefore (as Farwell J. held) the Crown can claim as bona vacantia property in the hands of another person only if that person holds on trust, the receiver can be regarded as a trustee. This, however, is only a subsidiary point, for it is contended that Farwell J.'s decision on that point is wrong.

Under the Companies Act, 1929, s. 296, property and rights vested in a company on its dissolution belong to the Crown as bona vacantia. It is contended that this provision is retrospective. This section replaces s. 71 of the Companies

Act, 1928. There is no authority on the question, but in *In re Family Endowment Society* (1) s. 199 of the Companies Act, 1862 (now represented by s. 338 of the Act of 1929), providing for the winding up of unregistered companies, was held to apply to a company dissolved a year before the Act of 1862 came into force. That was notwithstanding the provision in sub-s. 3 of s. 199 that the circumstances in which an unregistered company might be wound up are "whenever the company is dissolved. . . ." It is contended that in s. 296 of the Companies Act, 1929," Where a company is dissolved " should be treated as retrospective. That case was followed in *In re Russian and English Bank.* (2) In *Hastings Corporation* v. *Letton* (3) a lease was held to determine when the corporation was dissolved without having assigned the lease. It is on account of this decision that the words in brackets in s. 296 of the Act of 1929 were inserted : " including leasehold property but not including property held by the company on trust for any other person." This makes it difficult to say that the section is merely declaratory of already existing law ; and the Court cannot be asked to say that *Hastings Corporation* v. *Letton* (3) was wrongly decided, as it was cited without disapproval in *Morris* v. *Harris.* (4)

Assuming that the Court is not prepared to decide that s. 296 of the Act of 1929 has a retrospective operation, the main question arises whether, apart from the statute, property of a dissolved company vests in the Crown as bona vacantia. There is very little authority on the subject, but the old text-books support the Crown's view : Robertson's Civil Proceedings by and against the Crown, p. 494 ; Kyd on Corporations (1794 ed.), vol. ii., p. 516 ; Grant on Corporations, p. 304 ; 1 Black. Com., pp. 298, 299 ; Enever on Bona Vacantia, pp. 18, 51.

[LORD HANWORTH M.R. referred to *Colchester Corporation* v. *Seaber.* (5)]

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(1) (1870) L. R. 5 Ch. 118.
(2) [1932] 1 Ch. 663.
(3) [1908] 1 K. B. 378.
(4) [1927] A. C. 252, 259.
(5) (1766) 3 Burr. 1866, 1868.

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It is no doubt somewhat anomalous that a freehold property reverts to the grantor and does not escheat to the Crown, as stated in Co. Lit. 7*b*; but in Robertson on Civil Proceedings by and against the Crown, p. 422, it is stated that the authorities are mostly against that view. That, however, is immaterial for the purpose of the present case, and so also, it is contended, is the decision as to leaseholds in *Hastings Corporation* v. *Letton.* (1) That personal estate including equitable interests passes to the Crown as bona vacantia was decided in *In re Higginson & Dean.* (2) That was a case relating to a chose in action, and it is contended that the equity of redemption here in question is a similar kind of interest. It is true that in that case Wright J. seems to have rested his decision on the fact that there was a trustee for the dissolved corporation, but it is contended that this is unnecessary. There is nothing in the old text-books, such as Kyd on Corporations, to suggest that the absence of a trustee makes any difference, and really it is inherent in Wright J.'s judgment that all personal property (except leaseholds and franchises) vests in the Crown as bona vacantia.

There is the further case of *In re Henderson's Nigel, Ld.* (3), where Neville J., in a case where a company had ceased to exist and there were no creditors, held that further assets of the company which had come in appeared to be bona vacantia and directed notice to be given to the Attorney-General on behalf of the Crown. But on a subsequent application the Crown agreed to make no claim. The order of Neville J. in that case can only have been made on the basis that there was no trust but that the money still remained the property of the company.

In *Middleton* v. *Spicer* (4) it was held that where a legacy to a charity failed and there were no next of kin the executors held as trustees for the Crown.

As to the observation in the judgment of Farwell J. that there is something in the nature of an equity of redemption which prevents the claim of the Crown from succeeding. If the proposition of the learned judge is right it should be of universal application, but that is not so; for example, on an attainder the Crown obtains a right to redeem a mortgage.

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(1) [1908] 1 K. B. 378.

(2) [1899] 1 Q. B. 325.

(3) [1911] W. N. 159.

(4) 1 Bro. C. C. 201.

There is nothing in the nature of an equity of redemption which causes it to disappear when the mortgagor disappears.

It is admitted that the case of escheat is quite different from that of bona vacantia.

[Lord Hanworth M.R. The case of a felon seems to be material.]

That was *Attorney-General* v. *Crofts* (1), where the Attorney-General, on behalf of the Crown, was admitted to redeem the mortgaged estate of a person indicted and outlawed for high treason. That case shows that there is nothing inherent in the nature of an equity of redemption which will prevent it from passing to the Crown.

Downe (*Viscount*) v. *Morris* (2), which decided that in the case of copyholds an equity redemption was an estate in the land which would pass to the lord by escheat, is strongly in favour of the view of the Crown as to the nature of an equity of redemption. See also *Beale* v. *Symonds.* (3)

Choses in action of an alien enemy belong to the Crown: *Attorney-General* v. *Weedon* (4), followed by the Court in *In re Ferdinand, Ex-Tsar of Bulgaria.* (5)

[Lord Hanworth M.R. referred to Halsbury's Laws of England, vol. xi., p. 30, and *Megit* v. *Johnson.* (6)]

Fergus Morton K.C. and *R. H. Hodge* for the beneficiaries under the will. There are only two points in this case: (1.) Whether or not s. 296 of the Companies Act, 1929, is retrospective and (2.) whether the Court will extend the doctrine of bona vacantia to the case of an equity of redemption which was formerly vested in a corporation which has been dissolved.

No case has been cited in which there have been the two elements (1.) an equity of redemption and (2.) a corporation which has been absolutely dissolved.

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(1) (1708) 4 Bro. P. C. 136.
(2) (1844) 3 Hare, 394.
(3) (1853) 16 Beav. 406, 414.
(4) (1699) Parker, 267.
(5) [1921] 1 Ch. 107.
(6) 2 Dougl. (K. B.) 542.

If an equity of redemption could vest in the Crown as bona vacantia these absurd results would follow: the mortgagee could never sue for his money; he could never foreclose the mortgage and could never take advantage of the Statutes of Limitation; and, on the other hand, the Crown could redeem at any distance of time—e.g., 100 years hence.

[ROMER L.J. What would happen if the Crown bought an equity of redemption?]

The Court is here being asked to say that a contract continues to exist notwithstanding the death of one of the parties.

Dealing then with the first point, whether s. 296 of the Companies Act, 1929, is retrospective. That section provides: "Where a company is dissolved, all property and rights whatsoever vested in or held on trust for the company immediately before its dissolution (including leasehold property but not including property held by the company on trust for any other person) shall, subject and without prejudice to any order which may at any time be made by the court, ... be deemed to be bona vacantia and shall accordingly belong to the Crown." It is submitted that that section is not retrospective. The word "shall" is used twice in the section, and the Legislature inserts the words "leasehold property" because leasehold property does not vest in the Crown as bona vacantia.

[LORD HANWORTH M.R. We do not think the section is retrospective.]

Farwell J. in the Court below deals with the question whether an equity of redemption can be held by the mortgagees as trustees for the mortgagors and holds that it cannot be so held.

In re Higginson & Dean (1) was a case of a trust and nothing else, and does not touch the present case. The cases referred to in that case were all cases of trusts—namely, *Barclay* v. *Russell* (2); *Powell* v. *Merrett* (3);

(1) [1899] 1 Q. B. 325.
(2) (1797) 3 Ves. 424.
(3) (1853) 1 Sm. & Giff. 381.

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Cradock v. *Owen* (1); *Read* v. *Stedman* (2); and *Cunnack* v. *Edwards.* (3)

It is admitted that if you find a trustee who holds property for a corporation which goes out of existence the Crown takes it as bona vacantia: Stephen's Com., 15th ed., p. 607, as to bona vacantia. In the case of a dissolved corporation you must find an actual trustee.

Downe (*Viscount*) v. *Morris* (4) does not assist the Crown in this case. Here the company had no estate to support the equity of redemption. In that case there was a mortgage by demise, and the fee simple was left in the mortgagor.

See also *Hastings Corporation* v. *Letton* (5), where it was held that on the dissolution of a corporation a lease did not vest in the Crown as bona vacantia but that the reversion on the lease was accelerated and the land reverted to the lessor.

Although there is no case directly in point, such decisions as there are as to dissolved companies indicate that a right of property not vested in a trustee does not survive the dissolution of the company.

In the case of forfeiture the mortgagor is alive, but in that of a dissolved company there is no one.

In re Higginson & Dean (6) supports the contention that the only rights which survive the dissolution of a company are rights which are vested in a trustee for it. That was the interpretation put on that case by Farwell J., and it is submitted that it is the right one.

[*Stafford Crossman* referred to *In re Barnett's Trusts.* (7)]

[LAWRENCE L.J. The difficulty I have is in seeing what is the difference between the death intestate of a bastard and the dissolution of a company.]

If the Court decides in favour of the Crown in this case it will be going further than Wright J. went in *In re Higginson & Dean.* (6)

The true effect of *Hastings Corporation* v. *Letton* (5) is that if you find a lease existing at the dissolution of a company

(1) (1854) 2 Sm. & Giff. 241.
(2) (1859) 26 Beav. 495.
(3) [1896] 2 Ch. 679.
(4) 3 Hare, 394.
(5) [1908] 1 K. B. 378.
(6) [1899] 1 Q. B. 325.
(7) [1902] 1 Ch. 847.

the lease disappears, but if the company has previously to its dissolution assigned the lease that is not so. The lease exists as long as the assignee exists. Phillimore J. put it on the ground that you cannot have a lease without a leaseholder.

[LORD HANWORTH M.R. You can make very little of that case. I think we had better leave it where it is.]

The case is supported by *In re Albert Road, Norwood* (*Nos.* 56 *and* 58) (1) and by *In re Woking Urban District Council* (*Basingstoke Canal*) *Act*, 1911. (2)

The *Hastings Corporation* case (3) shows that there is a marked distinction between the case of a dissolution of a company, forfeiture for treason, and death of an intestate bastard. There is a distinction between the case of the death of an intestate bastard and the dissolution of a company, because in the former case the Crown takes subject to the payment of debts.

[LORD HANWORTH M.R. That is only ex gratia. It cannot be the duty of the Crown to pay the debts of some one else.]

Only to the extent of the assets.

[*Stafford Crossman* referred to s. 9 of the Administration of Estates Act, 1925. That section vests the property in the Probate judge which passes to the administrator on his taking out administration. When the administrator takes out administration he undertakes to pay the debts.]

[LORD HANWORTH M.R. referred to *Manning* v. *Napp.* (4)]

In *Beale* v. *Symonds* (5) it was held that where a person made a mortgage in fee and died intestate without heirs the equity of redemption did not escheat to the Crown, but belonged to the mortgagee, subject to the debts. The principle is thus stated by Romilly M.R. (6): "The principle I apprehend to be, that neither the Crown nor the lord can enter or seize where there is a legal tenant in possession."

That is in our favour. An equity of redemption is an interest unsupported by a legal estate. The Intestates Estate Act, 1884, was necessary to meet the decision in

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(1) [1916] 1 Ch. 289.

(2) [1914] 1 Ch. 300, 315.

(3) [1908] 1 K. B. 378.

(4) (1692) 1 Salk. 37.

(5) 16 Beav. 406.

(6) Ibid. 413.

Beale v. *Symonds.* (1) It is true that in that case the question as to the equity of redemption was not argued.

[*Stafford Crossman* referred to *Taylor* v. *Haygarth.* (2)]

As to the cases cited by the Solicitor-General, *In re Henderson's Nigel, Ld.* (3), related to the case of a physical chattel in the possession of the company at the time of its dissolution, and has no application to the present case.

Middleton v. *Spicer* (4) was a case where there was an actual trustee and where it would have been inequitable for him to retain the property for his own use. In *Colchester Corporation* v. *Seaber* (5) the ground of the decision was that there had been no dissolution of the corporation: see per Lord Mansfield. (6) The case is therefore of no assistance on the point as to what happens on the dissolution of a corporation. *In re Higginson & Dean* (7) was simply the case of a trust. There at the dissolution of the company the property was vested in a trustee for the creditors.

We ask the Court to say that the Crown's claim is not supported by any authority.

It is submitted that on the dissolution of a company nothing survives except chattels which can be carried away and property which is vested in trustees.

Here the mortgagee who had already got the legal estate takes the property. There is no trustee and the equity of redemption is wiped out. The case might have been different if the equity of redemption had been assigned to a trustee.

[They also referred to *Bartlett* v. *Rees* (8) and *Hancock* v. *Attorney-General.* (9)]

Nicholson Combe for the plaintiff, the surviving trustee-mortgagee.

Stafford Crossman in reply. An equity of redemption is an equitable estate inherent in the land: *Pawlett* v. *Attorney-General.* (10) That is borne out by *Casborne* v. *Scarfe* (11), where Lord Hardwicke says that "an equity of redemption has always been considered as an estate in the land."

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(1) 16 Beav. 406.
(2) 14 Sim. 8, 16.
(3) [1911] W. N. 159.
(4) 1 Bro. C. C. 201.
(5) 3 Burr. 1866.
(6) 3 Burr. 1870.
(7) [1899] 1 Q. B. 325.
(8) (1871) L. R. 12 Eq. 395.
(9) (1864) 33 L. J. (Ch.) 661.
(10) (1657) Hardres, 465.
(11) (1737) 1 Atk. 603, 604.

Cholmondeley (*Marquis of*) v. *Clinton* (*Lord*) (1) deals with the question as to the extent to which the mortgagee is a trustee for the mortgagor.

Dyke v. *Walford* (2) is the first case in which the term bona vacantia was used.

The common law doctrine is that all property must have an owner: *Armory* v. *Delamirie.* (3) An equity of redemption, being property, passes, where its owner cannot be found, like all other ownerless property, to the Crown.

Cur. adv. vult.

July 18. The following written judgments were delivered :—

LORD HANWORTH M.R. This is an appeal by His Majesty's Attorney-General from an order made by Farwell J. on January 21, 1932, whereby he declared that certain leases are now vested in the plaintiff as the sole surviving trustee of the will of Sir Thomas Spencer Wells, deceased, free from any right of redemption under the mortgage. The Attorney-General claims that the equity of redemption of these leases passed to the Crown in the circumstances hereinafter stated, as bona vacantia belonging to His Majesty by virtue of his Royal Prerogative and in right of his Crown.

The facts are fully stated in the report of the case before Farwell J. (4), but must be shortly recalled for the purpose of this judgment.

Sir Thomas Spencer Wells by his will, dated November 19, 1896, appointed three persons as his executors and trustees of whom the plaintiff alone survives. The testator died on January 31, 1897, and probate of his will was granted on March 30 of that year. By the terms of the will the residue of his estate after payment of his debts and certain legacies was to be invested and held on the trusts therein declared. The investments authorized included leaseholds in Great Britain.

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(1) (1820) 2 J. & W. 1, 182.

(2) 5 Moo. P. C. 434.

(3) (1735) 1 Strange, 504.

(4) [1932] 1 Ch. 380.

In 1899 certain leasehold premises known as Nos. 3, 4 and 5 John's Park Mansions, Pemberton Gardens, were vested in the Tufnell and Caledonian Parks Syndicate, Ld., under leases granted to the company in April and July, 1899, respectively, for the term of ninety-nine years, less the last three days thereof, from June 24, 1868; and by an indenture of mortgage, dated October 31, 1899, between the above company and the then trustees of the will of Sir Thomas Spencer Wells, these leasehold properties were mortgaged to the trustees by assignment of the unexpired residue of the said three several terms to secure the sum of 4325*l.* at 4 per cent.

On March 23, 1910, a special resolution of the company was passed that the company should be wound up voluntarily and for the appointment of a liquidator, and this resolution was confirmed by a resolution of the company on April 7 following.

Notice requiring repayment of the mortgage money was given to the liquidator on July 29, 1913, and upon default being made, the trustees as such mortgagees, on December 10, 1913, appointed a receiver—Claude Lound—of the income of the premises comprised in the mortgage of 1899. At that time the balance of the rents received quarterly, after deducting the outgoings, were insufficient to discharge the interest falling due and were carried over to the next account without reducing the sum total of the interest accrued due, or that accruing due.

On February 23, 1916, the company held its final meeting, when the accounts of the liquidator were laid before the shareholders, and the return was registered on February 24, 1916, by the Registrar, and the dissolution of the company became effective on May 24, 1916. The receiver, Lound, was in 1921 replaced by one Percy Lawrence, who died in 1928, and from that date an agent was appointed by the surviving trustee to manage and collect the rents of the premises.

Before the dissolution of the company took effect, no effort was made to deal with the equity of redemption in the leaseholds above referred to; but since that time the rents received from the mortgaged premises have increased, with the result that since the date of the appointment of the receiver down to the present time, the total income therefrom, after allowing for the necessary and proper outgoings, is sufficient to discharge the amount of the mortgage interest for the whole period and to leave a balance over. The equity of redemption has thus become of value.

The Crown claims to be entitled to it as bona vacantia, while the surviving trustee claimed that in the circumstances no one was entitled to redeem the property, and that he, as survivor of the mortgagees to whom the property had been assigned, was entitled to it free from any equity of redemption. The trustee, therefore, issued a summons to which one of the beneficiaries and the Attorney-General were parties. On the hearing before Farwell J., he decided that after the dissolution of the company the mortgagees had an estate which was freed from any right in any one to redeem, and that the moneys in their hands representing the surplus rents are their property, and that the Crown has no claim to them.

From that decision the Crown appeals.

If the question were one to which s. 71 of the Companies Act, 1928, applied, a short answer could be found to it in that section which is now replaced by s. 296 of the Companies Act, 1929. But that s. 71 first introduced the words in the brackets "(including leasehold property but not including property held by the company on trust for any other person)"; and where a new provision is made by a statute the ordinary rule applies that its effect is prospective, unless there is some clear indication that it is intended to have a retrospective effect. This rule is clearly stated and the authorities supporting it given in Maxwell on Statutes, 7th ed., p. 186. There is no such indication to be found in the Act, and the question cannot, therefore, be decided by this short cut.

It is necessary to consider whether the right of the Crown to bona vacantia can be applied to an equity of redemption of leaseholds, which is not vested in any specified person. I emphasize this, because the learned judge based his judgment upon the view which he considered that Wright J. had taken in *In re Higginson & Dean* (1), namely: "that the only cases where the Crown can maintain an action to recover as bona vacantia property or money in the hands of another person is where the Crown can show that the property or money is held upon a trust which has failed." Farwell J. (2) adopts that principle as governing and deciding the claim of the Crown in the present case.

The nature of the doctrine as to bona vacantia is stated in the passage from Blackstone's Commentaries quoted in the judgment below, and two questions arise for consideration upon the present facts, namely: (1.) Does the legal phrase bona vacantia include an equity of redemption in leasehold property? (2.) Is it true that such an equity must be vested in some person as a trustee for some other person or legal entity which has ceased to exist, as a condition precedent to the success of the claim of the Crown?

It is not easy to discover the logical reason on which this latter condition as to a trust is founded, and it must be discussed later on.

The principle under which the Crown takes bona vacantia is baldly stated in the argument of the Attorney-General in *Middleton* v. *Spicer* (3): "The King is the owner of every thing which has no other owner."

That view was accepted by Lord Thurlow in his judgment (4) in that case, in which he was dealing with leaseholds held by an executor upon a trust which had failed, for he says: "the Crown would have had a right had there been no executor."

So also in *Dyke* v. *Walford* (5) the Privy Council accepted this view as authoritative. The question that arose in that case was whether the right to goods belonging to persons dying intestate, without leaving husband or widow and without any next of kin, passed to the Crown as bona vacantia, and if so, whether the King had granted the right to them to the Duchy of Lancaster. The origin and history of bona vacantia was considered and dealt with in the judgment delivered by the judge, who was afterwards Lord Kingsdown (1): "The origin of this right shows that, if it existed at all, it must have existed from the foundation of the Monarchy; it is the right of the Crown to '*bona vacantia*'; to property which has no other owner. This is the ground upon which it is plainly rested by *Lyndwood*, in the reign of *Henry* the Sixth, and by Lord *Thurlow*, in his decision in *Middleton* v. *Spicer* (2), in the reign of *George* the Third. . . . . We consider it, therefore, to be perfectly clear that, at the date of the Charters [granted by Edward III., 1377] on which the Duchy claim is founded, the right in question, was vested in the Crown, as one of its '*jura regalia*,' and the question is, whether, under the terms of these Charters, it passed to the Duchy."

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(1) [1899] 1 Q. B. 325.

(2) [1932] 1 Ch. 380, 389, 391.

(3) 1 Bro. C. C. 201, 202.

(4) Ibid. 205.

(5) 5 Moo. P. C. 434.

Lord Mansfield, in *Megit* v. *Johnson* (3), broadly states that upon the intestacy of a bastard or of a legitimate person without next of kin, the King takes as ultimus haeres, but subject to the debts of the intestate, and in that case the right of the Crown upon the death of a man felo de se was accepted. In *Taylor* v. *Haygarth* (4), to which I refer below, the Crown was held entitled to the personalty of an illegitimate who died intestate.

Acting upon this principle, there does not appear to be any difficulty in holding that the rule of bona vacantia extends to an equity of redemption of leaseholds, for it is not to be considered as a mere equity. In *Pawlett* v. *Attorney-General* (5) there was a bill to redeem a mortgage as against the Crown then in possession of the land mortgaged upon the failure of the mortgagor to pay and the attainder of the heir of the mortgagee. Hale C.B. held that "a power of redemption is an equitable right inherent in the land, and binds all persons . . . . Because it is an ancient right, which the party is entitled to in equity." The Court were divided on the question whether that right could be enforced against the

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(1) 5 Moo. P. C. 495.

(2) 1 Bro. C. C. 201.

(3) 2 Dougl. (K. B.) 542.

(4) 14 Sim. 8.

(5) Hardres, 465, 469.

Crown, but it is unnecessary to refer to that part of the judgment.

Lord Hardwicke, in *Casborne* v. *Scarfe* (1), definitely held that "an equity of redemption has always been considered as an estate in the land, for it may be devised, granted, or entailed with remainders, and such entail and remainders may be barred by a fine and recovery, and therefore cannot be considered as a mere right only, but such an estate whereof there may be a seisin ; the person therefore intitled to the equity of redemption is considered as the owner of the land, and a mortgage in fee is considered as personal assets."

Lord Hale's words cited above were quoted with approval by Sir Thomas Clarke M.R. in *Burgess* v. *Wheate* (2), and he adds the words of Lord Nottingham : "An equity of redemption charges the land, not a trust." See also *Cholmondeley* (*Marquis of*) v. *Clinton* (*Lord*). (3) In fact, in some cases of outlawry and felony it has been held that the Crown by legal right takes an equity of redemption. Thus, in *Attorney-General* v. *Crofts* (4), a mortgagor was outlawed for high treason, and it was held in the House of Lords that the Attorney-General was to be admitted to redeem the premises, paying what was due for the principal and interest upon the mortgage debt. In *Bartlett* v. *Rees* (5) the interest of the mortgagor—a convicted felon—was then (1871) held to be forfeited to the Crown by reason of his conviction.

Beale v. *Symonds* (6) points in a different direction, but I cannot think that Lord Romilly's decision prevails against those above quoted, more especially as the Attorney-General was not before the Court and the Crown was not represented. The decision was based upon that of *Burgess* v. *Wheate* (7), which has been treated as the authority for the proposition that the Crown had no title to equitable estates in freeholds.

As pointed out in Sir G. S. Robertson's Civil Proceedings by and against the Crown (1908 ed.), *Burgess* v. *Wheate* (7) only decided that the Crown had no title by escheat, and that the question whether it might not have a title to such estates as being bona vacantia was overlooked. This oversight is adverted to in the argument of counsel for the Crown in *Taylor* v. *Haygarth.* (1) The Crown was there held entitled to the personalty of the deceased who died intestate, but was held not to be entitled to an act of a Court of Equity to give foundation to its rights, by means of the doctrine of conversion, for the purpose of converting the freehold estate in fee into personalty. The general principle "that by the law of the land, the Crown is entitled to the undisposed of personal estate of any person who happens to die without next of kin," was adopted and enforced. The Crown's right to an equity of redemption as an estate or interest in the land was not in question.

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(1) 1 Atk. 603, 604.

(2) (1759) 1 Eden, 177, 206.

(3) 2 J. & W. 1, 184, 185.

(4) 4 Bro. P. C. 136.

(5) L. R. 12 Eq. 395.

(6) 16 Beav. 406.

(7) 1 Eden, 177.

It is argued, however, that the right of the Crown is not, as stated above, to take property which has no other owner; but that in the case of a right of property which is incorporeal, that right will not survive unless it is vested in a trustee and so kept alive; in other words, such a right only survives where there is a trust that fails.

The question, therefore, must be asked and answered—what is the reason for this curious condition or qualification of the broad rule above stated; on what foundation does it rest?

The equity of redemption is a right of property which can be disposed of by the mortgagor. The mortgagee is not in a general sense a trustee for the mortgagor. Their respective interests are antagonistic, though in a limited sense the mortgagee is a trustee for the mortgagor, for example, in respect of the surplus of the purchase money after his own claims have been satisfied and if there is no other mortgage. That leaves the problem unsolved—why should the mortgagee upon a failure of the trust for any person entitled to the equity of redemption become entitled to a larger interest in the mortgaged property than his right as a mortgagee gives him?

(1) 14 Sim. 8, 10, 15, 16.

But if the mortgagee were to be treated as a trustee, can that give him a right to the equity? It is clear from a number of cases that the trustee of personalty cannot take for himself. "Where the trust fails, if there are no next of kin, the executor must hold it as trustee for the Crown": see per Sir John Stuart V.-C. in *Powell* v. *Merrett* (1); see also *Cradock* v. *Owen* (2), *Cunnack* v. *Edwards* (3); indeed, the cases from *Middleton* v. *Spicer.* (4)

In *Attorney-General* v. *Crofts* (5), the question was whether an absolute assignment was in truth and in fact a mortgage, and it was found so to be, and thereupon the Attorney-General was admitted to redeem the premises in question as upon an equity of redemption which had passed to the Crown. There was not in that case any trustee who had kept alive the right of redemption which, ex facie, appeared to have been erased and non-existent.

The examination of the cases as above leaves the foundation of the argument that the right of the Crown survives only where there is a trustee resting upon the decision in *In re Higginson & Dean* (6) alone.

The decision in *Hastings Corporation* v. *Letton* (7), does not assist—indeed, is not relevant. The point that was there decided was that a lease to a corporation was to be treated as conditional for the life of the corporation and ceased upon its dissolution. The decision itself is not easily understood; for a good deal of the reasoning in the judgment appears to turn upon what metaphor was most closely appropriate to the facts under consideration. In any case it is not an authority which conflicts with *In re Higginson & Dean* (6), and the decision turned on the facts as found by the Court.

The very learned judgment of Wright J. in *In re Higginson & Dean* (6) may be accepted as determining that upon the distribution of the bank in the case before him, the right of property or interest which had belonged to it was not annihilated but continued to be existing personal property. So in the present case, following that authority—for it does not appear to be necessary to go over the same ground again, upon which I should respectfully reach the same conclusion—upon the dissolution of the Tufnell and Caledonian Parks Syndicate, Ld., the equity of redemption was not annihilated or merged or lost, but continued to be an existing right or interest in the mortgaged premises.

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(1) 1 Sm. & Giff. 381, 383.
(2) 2 Sm. & Giff. 241.
(3) [1896] 2 Ch. 679.
(4) 1 Bro. C. C. 201.
(5) 4 Bro. P. C. 136.
(6) [1899] 1 Q. B. 325.
(7) [1908] 1 K. B. 378.

Wright J.'s judgment expressly leaves open the question now before us. His words are (1): "it would, however, I think, in the present state of the authorities, be judicial legislation to declare the Crown entitled to maintain actions in such cases, except where it can allege a trust." But the words are confessedly obiter. His attention was not directed mainly to the point upon which he offers the benefit of his opinion. We have had the advantage of a further examination and review of the authorities, and I have failed to find any authority which directly supports the observation of the learned judge. We have failed to find any sufficient reason upon which it can be based. So-called judicial legislation may fall to be a duty of the Court in such circumstances. If there be no statute or authority or reason which binds us to accept Wright J.'s dictum, it is our duty to give expression to the opinion which we have formed, and perhaps also not to be unmindful of the maxim—"Cessante ratione legis cessat et ipsa lex."

For these reasons, in my judgment, the appeal must be allowed and a declaration made that the Crown is entitled to claim the equity of redemption as bona vacantia.

LAWRENCE L.J. I agree with Farwell J. that s. 296 of the Companies Act, 1929, is not retrospective and consequently does not apply to the present case, which falls to be determined apart from the recent statutory provisions affecting the destination of the property and rights of dissolved companies.

(1) [1899] 1 Q. B. 325, 332.

In these circumstances, the question (upon which there is no direct authority) is whether the equity of redemption in leasehold property mortgaged by assignment by a limited company, which was dissolved in 1916, devolved on the Crown as bona vacantia or whether, as the learned judge has held, it became extinguished.

Bona vacantia (the Crown's right to which is not in dispute) are defined in Blackstone's Commentaries, vol. i., p. 298, as "goods in which no one else can claim a property." The expression "goods" in this definition has admittedly a larger signification than goods properly so called, and has long since been construed and accepted by the Courts as extending to personal property of every kind, both corporeal and incorporeal (including equitable interests in personalty). In *Dyke* v. *Walford* (1) the right of the Crown to succeed to the whole of the personal estate of a person dying intestate without next of kin as bona vacantia was traced back to very early times and was upheld as against the Ordinary. In the judgment delivered in that case there is the following passage dealing with the Crown's right to succession to the personal estate of such an intestate (2): "The origin of this right shows that, if it existed at all, it must have existed from the foundation of the Monarchy; it is the right of the Crown to '*bona vacantia*'; to property which has no other owner. This is the ground upon which it is plainly rested by *Lyndwood*, in the reign of *Henry* the Sixth, and by Lord *Thurlow*, in his decision in *Middleton* v. *Spicer* (3), in the reign of *George* the Third. In this case . . . . no doubt was ever suggested, as to the right of the Crown, in case of intestacy."

Counsel for the respondents admitted that if the equity of redemption in the present case had been vested in a person dying intestate without next of kin, or even if it had been vested in a trustee for the dissolved company, it would have devolved on the Crown as bona vacantia, but contended that as it was vested in the company itself at the time of its

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(1) 5 Moo. P. C. 434.

(2) 5 Moo. P. C. 495.

(3) 1 Bro. C. C. 201.

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dissolution without the interposition of a trustee it became extinguished.

In my judgment this contention is not well-founded. The right of the Crown to succeed to the personal estate vested in a company at the time of its dissolution does not in my opinion differ in substance from the right of the Crown to succeed to the personal estate of a person dying intestate without next of kin. In both cases the title of the Crown arises because the property has no other owner; such property must not, of course, be confused with property the owner of which is unknown. The old text-book writers on the law of corporations, such as Kyd (1794), vol. ii., p. 516, and Grant (1850), p. 304, expressed the opinion that the Crown is entitled to the personal estate of a dissolved corporation and, so far as I know, the correctness of that opinion has never been doubted.

The only difference between the case of an intestate and of a dissolved company is purely one of form. In the case of an intestate, his personal estate immediately on his death formerly vested in the Ordinary, and now vests in the Probate judge pending the grant of letters of administration. As the right of administration follows the right of property, letters of administration in the case of an intestate dying without next of kin are granted to the nominee of the Crown, but subject to the usual condition of paying the administration expenses and debts of the intestate. In the case of a dissolved company, the personal estate passes directly to the Crown, and there is no necessity to provide for the payment of any administration expenses or debts, as the Legislature has provided that these must be discharged before the company is dissolved.

Wright J., in *In re Higginson & Dean* (1) held that the fact that the personal estate of a dissolved company was vested in a trustee and was therefore not without a legal owner did not defeat the Crown's title to it as bona vacantia. The ground of this decision was that from the time of Lord Thurlow's decision in *Middleton* v. *Spicer* (2) it had been an

(1) [1899] 1 Q. B. 325.

(2) 1 Bro. C. C. 201.

accepted proposition of law that chattels real and personal vested in a person as a trustee on private trusts which have failed are as a general rule held by him as trustee for the Crown as bona vacantia. The principle upon which this proposition is founded is that a trustee cannot conscientiously set up a claim to the beneficial title to the trust property as against the Crown any more than he could have set up a claim to such a title as against his cestui que trust had the trusts not failed.

The contention that, because the Crown's title to a share in a trust fund belonging to a dissolved company as bona vacantia has been upheld notwithstanding that the trust fund was legally vested in a trustee, therefore unless the equity of redemption in question in the present case was vested in a trustee for the company the Crown cannot claim it as bona vacantia, seems to me wholly illogical; yet this is what the contention of the respondents on this appeal really amounted to.

This contention was founded upon that part of the judgment of Wright J. in *In re Higginson & Dean* (1) which dealt with the position of a debt due to a dissolved company and suggested a doubt whether the Crown could sue for the recovery of such a debt unless it could allege a trust. In my judgment this doubt is not justified; long before choses in action became transferable at common law they were regarded in equity as assignable and could be dealt with inter vivos and on the death of the owner devolved upon his legal personal representative as part of his personal estate. The statement in Blackstone's Commentaries, vol. i., p. 484, that the debts of a corporation either to or from it are totally extinguished by its dissolution and similar statements made by Kyd and Grant must either be read as having reference merely to the rights and liabilities of the individual corporators or else are obsolete. Moreover I find it difficult to reconcile the doubt expressed by the learned judge with his decision that the Crown had the right to recover its distributive share of the assets of the bankrupt's estate from the trustee. There is

(1) [1899] 1 Q. B. 325.

no difference in principle between a right to enforce payment of a share in a trust fund in the hands of a trustee and the right to enforce payment of a debt—both are choses in action and personal property which admittedly would pass to the Crown as bona vacantia in the case of persons dying intestate without next of kin. But it is not necessary to dwell on this subject, as the present case is not concerned with a debt. The actual decision in *In re Higginson & Dean* (1) was that the right to participate in the assets of the bankrupt in respect of the debt due to the dissolved company "existed as an equitable interest or chattel at the time of the dissolution, and upon the dissolution of the bank that chattel or interest was not annihilated, but continued to be existing personal property, which devolved upon the Crown as bona vacantia as completely as any other equitable interest." With that decision I entirely agree, and in my opinion it covers in principle the case of an equity of redemption in leasehold property.

The position of a mortgagee of land whether freehold or leasehold is well established. In equity the right of the mortgagee is limited to the money secured and he holds the land only as security for his money, therefore although he has the legal estate in the land, yet in equity he has a mere charge for the amount due to him. In equity the mortgagor is regarded as the owner of the mortgaged land subject only to the mortgagee's charge, and the mortgagor's equity of redemption is treated as an equitable estate in the land of the same nature as other equitable estates. Moreover no agreement between the parties that the mortgage should not be redeemable has any effect in equity, and any attempt to fetter the equity of redemption with any other condition than the payment of the money secured is null and void.

It follows from this relationship between mortgagor and mortgagee that it would be just as unconscionable for a mortgagee to set up a claim to hold the land comprised in his mortgage free from the equity of redemption as it would be for a trustee to set up a claim to retain the trust property

(1) [1899] 1 Q. B. 326, 333.

in his hands for his own use. Consequently the reasoning which has induced the Court to hold that a trustee cannot on failure of the trusts set up his legal title so as to defeat the Crown's claim to bona vacantia applies with equal force to a mortgagee of leaseholds where the mortgagor, being an individual, has died intestate without next of kin or, being a company, has been dissolved; in neither case will the mortgagee be permitted to set up his legal estate in the term so as to defeat the Crown's equity of redemption any more than he would have been permitted to set up that title to defeat the mortgagor's equity of redemption had the mortgagor still been in existence. It cannot make any difference whether the equity of redemption is or is not vested in a trustee for the company. The existence or non-existence of a bare trustee of an equitable estate cannot have any real bearing on the question whether on the dissolution of the company that equitable estate would be extinguished or would devolve upon the Crown as bona vacantia. If there were such a trustee, he (having no legal estate) would be looked upon by a court of equity as a mere cipher; the Court would treat the company as the owner of the equitable estate and disregard the trustee.

There only remains the contention that chattels real, belonging to a dissolved corporation, stand in a different footing from the other personal property belonging to such a corporation and do not devolve upon the Crown as bona vacantia. This contention is based on the decision of the Divisional Court in *Hastings Corporation* v. *Letton.* (1) In that case the plaintiffs had granted a lease of certain business premises in Hastings to a limited company which was subsequently dissolved but which before its dissolution had assigned the lease to another limited company. The assignee company was subsequently also dissolved, and the Divisional Court held that thereupon the lease did not vest in the Crown as bona vacantia but that the reversion was accelerated and that the premises reverted to the lessors. This decision was based on the statement in Blackstone's Commentaries, vol. i., p. 483, that to every grant to a corporation the law annexes a condition that if the corporation be dissolved the grantor shall have the lands again because the cause of the grant faileth. This statement was in turn based on the statement of Lord Coke (Co. Litt. 13*b*) that on the dissolution of a corporation lands belonging to it revert to the donor. This statement of the law has been criticized and adversely commented upon by (inter alios) Gray in his work on Perpetuities (ss. 44 to 51*a*) and Sweet in a note to Challis' Real Property, 3rd ed., App. VI., p. 467; both of these learned authors have for reasons which they have set out at length come to the conclusion that Lord Coke's statement is erroneous. The main reasons given by Sweet for arriving at this conclusion are that the dictum of Choke J. in the *Prior of Spalding's Case* (1), upon which Lord Coke mainly founded his statement, was an obiter dictum, as in the case before the Court the question was as to the nature of frank-almoigne tenure in which the donor and the lord must be the same person; that the other authorities cited by Lord Coke were really adverse to his statement, as they showed that on a dissolution of a corporation lands held by it belong to the lord not by reverter but by escheat; that if Lord Coke's statement were accurate it would be difficult to see how a corporation could alien its land free from the grantor's right of reverter; and that Preston's attempt to get out of this difficulty by speaking of corporations as having a fee simple for the purpose of alienation, but only a determinable fee for the purpose of enjoyment (1 Preston's Abridgement, p. 272), was not satisfactory, because if that explanation were correct, a condition against alienation might be annexed to a grant to a trading company at the present day. Finally Sweet says, p. 468: "On the whole, therefore, it may be said with some confidence that the statement[s] of Lord Coke and Mr. Preston are contrary both to principle and to authority, and that the decision in *Hastings Corporation* v. *Letton* (2) is erroneous." I agree with this conclusion and with the reasons upon which it is based; it is unnecessary therefore to consider whether even if Lord Coke's statement of the law were correct, the Divisional Court in *Hastings Corporation* v. *Letton* (1) was right in applying the doctrine of reverter to a lease for a term of years, a question which is open to serious doubt (see Gray on Perpetuities, p. 51), and could not be decided in the present case in the absence of the head-lessor.

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(1) [1908] 1 K. B. 378.

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(1) 7 Edw. 4, 10 to 12.

(2) [1908] 1 K. B. 378.

In any event, however, the decision in *Hastings Corporation* v. *Letton* (1) is no authority for the general proposition that the rule that the personal estate of a dissolved company devolves on the Crown as bona vacantia does not apply to chattels real. The decision was based entirely on the alleged doctrine of reverter and has no application to such chattels real as equitable interests in leaseholds, although if, contrary to my opinion, the decision was right, it would afford some support to a claim by the head-lessor in the present case that the sub-lease had come to an end on the dissolution of the company, a question which cannot be decided in the present proceedings, as the head-lessor is not before the Court.

In the result, however, for the reasons stated, I am of opinion, on the assumption that the sub-lease is still subsisting, that the equity of redemption in question was not extinguished on the dissolution of the mortgagor company but passed to the Crown as bona vacantia, and that this appeal ought to be allowed.

Romer L.J. In my opinion it is established law that the Crown is entitled to all personal property that has no other owner. The property to which this law is most commonly applied is that of an intestate dying without leaving a widow or next of kin. It was property of this kind that was the subject-matter of the action of *Dyke* v. *Walford*. (2) In delivering the judgment of the Privy Council in that case, a judgment that affirmed the right of the Crown to the personal estate of a bastard, who had died intestate, Mr. Pemberton Leigh (as he then was) said this (3): "The

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(1) [1908] 1 K. B. 378.
(2) 5 Moo. P. C. 434.
(3) Ibid. 495.

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origin of this right shows that if it existed at all, it must have existed from the foundation of the Monarchy; it is the right of the Crown to '*bona vacantia*'; to property which has no other owner. This is the ground upon which it is plainly rested by *Lyndwood* in the reign of *Henry* the Sixth, and by Lord *Thurlow* in his decision in *Middleton* v. *Spicer* (1) in the reign of *George* the Third." The Privy Council in fact accepted the argument put forward by Mr. Parker in that case (2), that the rule at common law is that property must belong to somebody, and where there is no other owner, not where the owner is unknown, that is the distinction, it is the property of the Crown. The distinction referred to by Mr. Parker is, of course, that on which such cases as *Armory* v. *Delamirie* (3) are based. But this right of the Crown to property that has no other owner has been frequently stated by writers of great authority. In Coke's Institutes, 2nd part, at p. 167, it is said: "The cause wherefore originally wrecke was given to the Crowne stood upon two maine maximes of the Common Law: First, that the property of all goods whatsoever must be in some person. Secondly, that such goods, as no subject can claime any property in, doe belong to the King by His prerogative, as treasure trove, strayes, wrecke of the sea, and others." In Comyn's Digest, Prerogative D. (49), the same rule is stated thus: "The King, by His prerogative, is entitled to all goods which have no owner." 1 Blackstone's Commentaries, p. 299, contains a statement to the same effect, citing a passage from 1 Bracton, c. 12, s. 10. So does Brooks' Abridgment, tit. Prerogative le Roy, 12.

The extension of the doctrine to equitable interests was not, however, accomplished without some difficulty. Where there was an owner at law, such as a trustee, the common law doctrine would be inapplicable. The property was not without any other owner. The doctrine could therefore only be applied by analogy. But a formidable obstacle in the way of doing this was thought to have been occasioned by the

(1) 1 Bro. C. C. 201.

(2) 5 Moo. P. C. 434, 471.

(3) 1 Strange, 504.

case of *Burgess* v. *Wheate.* (1) In that case it had been held by Lord Northington and Sir Thomas Clarke, Lord Mansfield dissenting, that the equitable estate in lands which were vested at law in a trustee was not liable to escheat on the death of the cestui que trust without heirs; that is to say, that there being no escheat at law there should be none in equity. That case was followed in *Beale* v. *Symonds* (2), where Lord Romilly held that on the death intestate and without heirs of a mortgagor of lands, the legal estate in which was vested in the mortgagee in fee simple, the equity of redemption did not escheat to the Crown. Lord Romilly stated that the principle was that neither the Crown nor the lord could seize where there was a legal tenant in possession. In *Middleton* v. *Spicer* (3) a testator had by his will directed certain leaseholds to be sold, and bequeathed the proceeds of sale to his executors upon trusts that failed to take effect. The testator having died without leaving any next of kin, an attempt was made by the executors to defeat the claim of the Crown to the money. It was, however, argued by the Attorney-General that the case was governed by the general principle that the King is owner of everything which has no other owner, and though Lord Thurlow was at first inclined to think that, inasmuch as the will had vested the legal property in the executors, the case was indistinguishable in principle from *Burgess* v. *Wheate* (1), he ultimately decided in favour of the Crown. To the report of the case in the fourth edition Mr. Eden added a note, of which the material portion is as follows: "The determination of the present case does not in any degree affect the principles upon which Lord Northington and Sir Thomas Clarke founded their decision. It relates to a different subject matter, and rests on principles entirely different. The question in the present case was one of vacant possession, and therefore a question of prerogative. In *Burgess* v. *Wheate* (1) it was a question of tenure, the claim of the Crown having been admitted on all sides to be 'seigniorial and not prerogatival.'"

(1) (1759) 1 Bl. Rep. 123.
(2) 16 Beav. 406.
(3) 1 Bro. C. C. 201.

Both in *Burgess* v. *Wheate* (1) and in *Beale* v. *Symonds* (2), the claim of the Crown was based on the ground of escheat, and not on the ground that the equitable interest in the freehold devolved on the Crown as bona vacantia. Mr. Butler, in his notes on Coke upon Littleton, p. 191*a* (17th ed.), says this: "While the relation between the Lord and the tenant was great, the separation of the beneficial interest from the legal tenure was a serious mischief. As the relation is now exceedingly small, it is, in this respect, scarcely felt. In the case of *Burgess* v. *Wheate* (1) Lord Mansfield endeavoured to establish the right of the Crown to the benefit of a trust, which failed for want of an heir, by attempting to fix on trusts, the feudal incident of an escheat. In the discussion of the question the analogy appeared unnatural, and the case was decided against the Crown. A better ground in favour of the claim of the Crown might, perhaps, have been found by resorting to its acknowledged prerogative, of being entitled to the *bona vacantia* or every species of property of which no owner is discoverable." On the other hand, Lord Brougham, in *Henchman* v. *Attorney-General* (3), said that the Crown may take personalty as bona vacantia, but real estate it can never take unless by escheat. In these circumstances the question whether an equitable interest in real estate used to devolve on the Crown as being bona vacantia cannot be regarded as being clear. But the Crown's right to the equitable interests in personal estate of which interests there is no other owner does not, in my judgment, admit of doubt. This was established by the decision in *Middleton* v. *Spicer*. (4) In such cases, however, the equitable interest vests in the Crown, not because the legal interest is vested in trustees, but in spite of that fact. The right of the Crown to take as bona vacantia all legal interests in personal property of which there is no other owner had been established centuries before that case. It was suggested in argument in the present case that an equity of redemption stands on a

(1) 1 Bl. Rep. 123.
(2) 16 Beav. 406.
(3) (1834) 3 My. & K. 485, 492.
(4) 1 Bro. C. C. 201.

different footing from other equitable interests in relation to the doctrine of bona vacantia. It was said that the mortgagee would be prejudiced if the equity of redemption became vested in the Crown. The Statute of Limitations, for instance, would not run in the mortgagee's favour. But a similar argument might be advanced by a debtor to the estate of an intestate that has devolved upon the Crown, and yet it can hardly be suggested that the debt in question is to be excluded from the assets. I can see no valid reason for drawing any distinction between an equity of redemption and any other personal property in relation to the right of the Crown to bona vacantia. No difficulty was felt in the old days as to the right of the Crown to succeed to and enforce an equity of redemption in a term of years vested in a man convicted of high treason: see *Attorney-General* v. *Crofts.* (1)

Now if the Crown be entitled, as in my opinion it is, to the whole personal estate of an intestate dying without widow or next of kin, why should there be any doubt as to the right of the Crown to the personal estate of a corporation that has ceased to exist? The right of the Crown to bona vacantia depends upon the fact that there is no other owner of the property claimed, and cannot depend upon the particular reasons for the existence of that fact. I know of no authority for drawing any distinction between the case of such a corporation and the case of a man dying intestate and without kin, except the decision of the Divisional Court in *In re Higginson & Dean.* (2) In that case the Crown was held entitled to money held in trust for a corporation that had been dissolved on the ground, oddly enough, that it was so held, and not that it belonged to the Crown as bona vacantia in spite of its being so held. Wright J., indeed, in giving judgment, said that he thought that it would be judicial legislation to declare the Crown entitled to the rights of a dissolved corporation except when it can allege a trust. He said that in the case before him it was not necessary to decide the question. His statement to which I have referred was therefore merely obiter. But it has never yet been dissented from or questioned, and Farwell J. not unnaturally felt bound to follow it in the present case. In my judgment, however, the distinction drawn by Wright J. between personal property held in trust for a corporation and personal property held by a corporation without the intervention of a trustee is unsound, and cannot be supported. The learned judge, indeed, seems to refer to *Middleton* v. *Spicer* (1), and some of the numerous cases that followed it, as though the rule as to bona vacantia only applied to equitable interests in personal estate. He said the principle underlying those cases was that the Court will not allow a person who has obtained title or possession as a mere trustee of chattels to set up unconscientiously any beneficial title by occupancy possession or otherwise. So it was. But the principle was applied for the purpose of extending the common law doctrine as to bona vacantia to equitable interests, and to prevent the trustee relying upon his legal estate to defeat the claim of the Crown. In the present case the interest claimed by the Crown is an equity of redemption in property sub-leased to the corporation, and assigned by them to the plaintiff by way of mortgage to secure moneys that are still owing. On the dissolution of the corporation that equity of redemption passed, in my opinion, to the Crown as bona vacantia, assuming that the term granted by the sub-lease in question did not come to an end on the dissolution of the corporation. If it did, then obviously there was no interest in the demised property that could pass on the dissolution to the Crown, or any one else.

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(1) 4 Bro. P. C. 136.

(2) [1899] 1 Q. B. 325.

In order to determine this question it would be necessary to consider whether the decision in *Hastings Corporation* v. *Letton* (2) can be supported. According to the headnote to the case, it was decided that a lease to a corporation for a term of years determines if the corporation is dissolved without having assigned the lease. In point of fact, however, the lease in that case, though originally granted to a corporation that was dissolved on January 23, 1906, had in the year

(1) 1 Bro. C. C. 201.

(2) [1908] 1 K. B. 378.

1904 been assigned to another corporation that suffered the same fate on August 9, 1906. According to the decision of the Divisional Court, the lease survived the first dissolution, but succumbed to the second. The decision was not received by the legal profession with universal approval, and the reasons given for it are not very satisfactory. Phillimore J. seems to have given as one ground for his decision that there could not be a lease without a leaseholder. This no doubt is true. But it does not seem an adequate reason for deciding that the Crown did not, on the dissolution of the second corporation, become the leaseholder. He then observed that if the lease was still in existence there ought never to have been a dissolution of that corporation, because a company must strip itself or be stripped of all its property and obligations three months before it ceased to exist. Darling J. had also suggested much the same thing when he said (1): "The dissolution of a company is regulated by ss. 142 and 143 of the Companies Act, 1862, by which it is provided that before a company dissolves it shall have nothing; it must first be divested of everything, and is not permitted to dissolve until it is divested of everything." It is not easy to appreciate the relevancy of these observations unless it was intended to suggest that the dissolution of the company while the lease was still undisposed of was by itself a reason for regarding the lease as having ceased to exist. But the dissolution of a corporation does not exterminate every asset that the liquidator may have failed to get in or realize. Should he by some oversight have failed to dispose of the office table it is obvious that the office table still exists. And what is true of the office table must, as it seems to me, be true of the office lease. The considerations that I have mentioned, however, were only minor ones. The chief ground of the decision was a statement made by Blackstone in his Commentaries that the law doth annex a condition to every grant to a corporation that if the corporation be dissolved the grantor shall have the lands again because the cause of the grant faileth. The grant is indeed only during the life of

(1) [1908] 1 K. B. 384.

the corporation, which may endure for ever; but when that life is determined by the dissolution of the body politic the grantor takes it back by reversion, as in the case of every other grant for life. The statement so made by Blackstone received the approval of both Darling J. and Phillimore J. The former said it was still good law. The latter said that whether land be granted to a corporation in fee or for a term of years, the law so stated by Blackstone applies; the property is given on the implied condition that it is to be held during the life of the corporation. Now if this be so, it would have been a good reason for holding that the lease in question in that case came to an end on the dissolution of the lessee corporation. How and why it survived that dissolution, and only came to an end on the dissolution of the assignees, is more than I can understand. In the case of a grant of the fee to a trading corporation the inconvenience of the doctrine stated by Blackstone has been felt for a long time. If, for instance, a conveyance of land be made to a company formed for the purpose of developing and turning it to account, the fact, if fact it be, that on the dissolution of the company, which would probably take place as soon as the land had all been disposed of to purchasers, the land would revert to the grantors would seriously prejudice the sale of the land to the best advantage. It was therefore suggested by Mr. Preston, for the purpose of getting over this difficulty, that a corporation has a fee simple for the purpose of alienation, but only a determinable fee for the purpose of enjoyment. Assuming that such an estate be capable of existing at law, it would be an interesting problem to discover what would happen in the event of the grantee corporation alienating the fee to another corporation. Equally interesting problems arise if the doctrine as modified by Preston were applied to terms of years. If the lessee corporation assigns the lease to another corporation which is dissolved, does the assignment operate as an underlease that determines on the dissolution, or is it an assignment of the whole term, the assignor having, according to the doctrine, the whole term for the purpose of alienation? And what happens on the dissolution? Does the land revert to the original lessor, or to the lessee corporation? But in truth the whole doctrine is suspect. To begin with, a fee simple limited to continue during the existence of a corporation, even though limited only for the purpose of enjoyment, is a determinable fee, and serious doubts have been raised as to whether such a fee could be created since the Statute Quia Emptores. Professor Gray thought it could not. Mr. Challis took the opposite view. Mr. Charles Sweet, however, in a note to his third edition of Challis, said he thought the weight of authority and argument was in favour of Professor Gray. In the next place Mr. Charles Sweet in his notes to Challis contained in Appendix VI. gives reasons for saying "with some confidence" that the alleged doctrine, whether with or without Preston's modification, is contrary both to principle and authority, and that the decision in *Hastings Corporation* v. *Letton* (1) is erroneous. And here I must leave it. For the Court in the present case is in this difficulty. All the parties before it are united in asserting that the underlease is still in existence. The head-lessor, or rather those claiming through him, who would be interested in asserting that either the lease has already determined, or would, ipso facto, do so if the Crown redeemed the plaintiff's mortgage, are not before the Court. In the circumstances, therefore, all that the Court can now do, as it seems to me, is to discharge the order of Farwell J. and declare, in effect, that the equity of redemption in the leasehold in question, assuming the underlease still to be in existence, is vested in the Crown as bona vacantia.

I only wish to add that I agree with the Master of the Rolls, for the reasons given by him, that s. 296 of the Companies Act, 1929, is not retrospective.

Appeal allowed.

Solicitors: *Treasury Solicitor; Herbert Smith & Co.*

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(1) [1908] 1 K. B. 378.

W. I. C.

C. A.

1932

EVE J.

March 2, 3 ;
April 22 ;
May 3.

C. A.

May 24, 25.

In re AIREDALE GARAGE COMPANY, LIMITED.

ANGLO-SOUTH AMERICAN BANK, LIMITED *v.* THE COMPANY.

[1931. A. 252.]

Company—Debenture Holders—Appointment of Receiver—Payment of Rates then Assessed—Premises of Company partly Derated—Derating subsequently Cancelled on Appeal—Amendment of Valuation List—Demand for Additional Rates—Whether payable in priority to Debenture Principal and Interest—" Due and payable within twelve months next before " Receiver's Appointment—Rating and Valuation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 90), *s.* 36, *sub-s.* 2 ; *s.* 37, *sub-s.* 10—*Local Government Act,* 1929 (19 *Geo.* 5, *c.* 17), *s.* 70, *sub-s.* 3 ; *Sch. IX., Part II., para.* 1, *sub-paras.* 3 *and* 4—*Companies Act,* 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *ss.* 78, 264.

The duty cast by ss. 78 and 264 of the Companies Act, 1929, upon a receiver appointed by debenture holders of a company to pay rates then due from the company and " having become due and payable within twelve months next before " his appointment in priority to any claim for principal and interest in respect of the debentures, applies to a subsequent increase in those rates resulting from an appeal being allowed against the derating of part of the company's premises under the Local Government Act, 1929.

This is so, because, by s. 37, sub-s. 10, of the Rating and Valuation Act, 1925 (which is made applicable to such a case by Sch. IX., Part II., para. 1, sub-para. 4, of the Local Government Act, 1929), the resulting amendment of the valuation list is to be deemed to have had effect as from the commencement of the period in respect of which the rate was made and to be recoverable (under the combined effect of that sub-section and s. 36, sub-s. 2) " as if it were arrears of the rate " :—

So *held* by the Court of Appeal (Lord Hanworth M.R., Lawrence and Romer L.JJ.), reversing the decision of Eve J.

SUMMONS.

The facts as stated by the learned judge in his judgment were as follows :—

The Anglo-South American Bank, Ld., the plaintiffs in this action, which is one to enforce their security as holders of debentures issued by the defendant company and secured by a floating charge, are applying by this summons for directions as to how a claim advanced by the Corporation of Bradford to be preferential creditors of the defendant company in respect of increased or additional rates amounting

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AIREDALE GARAGE CO., *In re.* ANGLO-SOUTH AMERICAN BANK *v.* THE COMPANY.

to 84*l.* 5*s.* 2*d.*, assessed in consequence of an increase in the rateable value of certain premises forming part of the assets of the company, ought to be dealt with. The question involved is whether the priority given by the Companies Act, 1929, in such circumstances as here exist, to rates becoming due and payable within twelve months next before the appointment of the receiver is extended by certain provisions in recent Rating Acts to include additional rates payable in respect of the twelve months or some part thereof under assessments made at a date subsequent to the receiver's appointment.

On January 28, 1931, the bank, in exercise of a power contained in the debentures, appointed Mr. George Walker receiver of the defendant company's assets and undertaking, and by an order made in this action on February 6, 1931, he was appointed receiver and manager of the company's assets and business. The company was not in course of being wound up at the date of his appointment, but the bailiffs were in possession of its property or some parts thereof on behalf of the Corporation of Bradford in respect of unpaid rates amounting to 676*l.* 1*s.* 11*d.*, and finding it impossible to make any arrangement for them to withdraw, the receiver paid the amount of the levy and thereby discharged all rates assessed down to the end of March, 1931. The assessments are made yearly on April 1, and by virtue of the Companies Act, 1929, the Corporation were entitled as preferential creditors to the rate for the period between April 1, 1930, and January 28, 1931. For the purposes of this rate certain premises belonging to the company situate in Canal Road, Bradford, were assessed at 72*l.* for rating purposes, having been derated as industrial hereditaments as from October 1, 1929, the previous assessment being 288*l.* The Revenue officials appealed against this derating by the Corporation, but the appeal was held in suspense pending the decision of the Court of Appeal in other cases involving the same or similar considerations, and it was not until September 28, 1931, that the receiver was notified that the derating had been cancelled, except as to a comparatively small part of the premises, and that the Assessment Committee had raised the rateable figure from 72*l.* to 212*l.* On November 13, 1931, revised demands in respect of rates at the increased rateable value for the financial years ending on March 31, 1930, 1931 and 1932 respectively were served, and the question is whether the apportioned part of the increased demand for the period between April 1, 1930, and January 28, 1931, ranks as a preferential debt or ought to be dealt with as an ordinary unsecured debt of the company.

The receiver relies on the fact that the increase did not become due and payable within the twelve months next before he entered into possession; the Corporation, on the other hand, contend that the effect of recent legislation relating to rates is to make all amendments of the valuation list retrospective and of the same effect as they would have been had the corrected figures appeared in the original assessment. They therefore claim that the amendment raising the rateable value to 212*l.* relates back to the assessments made in April, 1930, and that the receiver must treat the increased payment for the period between April 1, 1930, and January 28, 1931, as entitled to preference.

Philip Sykes for the receiver. The defendants in 1929 applied to the Assessment Committee asking that certain premises belonging to them should be derated, and the Committee decided that the premises be derated to the extent of reducing the valuation for rates from 288*l.* to 72*l.* The Revenue Officer objected and an appeal was lodged, but proceedings were stayed pending the decision in the Courts on another case. It was not until September 28, 1931, that the receiver was served with notice that the derating was cancelled, and that a larger rate was due from the defendants. This is now claimed as being payable in priority to the claims of the debenture holders.

It is submitted that the question is one depending entirely on the construction of ss. 78 and 264 of the Companies Act, 1929. The extra rate demanded on September 28, 1931, cannot be said to have been "due and payable" at any time within the twelve months before the relevant date, January 28, when the receiver was appointed. Even if the rate is to be "deemed to be due and payable," as if it were arrears, under ss. 35, 36 and 37 of the Rating and Valuation Act, 1925, it is not in fact due and payable under the Companies Act so as to give the Corporation a right to preferential payment: see *Vestry of St. John, Hampstead* v. *Cotton* (1), where Lord Halsbury L.C. says that the words of a statute are to be interpreted according to their ordinary and natural meaning: *M'Cowan* v. *Baine.* (2) Under the Companies Act, 1929, s. 264, sub-s. 5, preferential debts are to be paid "forthwith." Business matters must be dealt with with reasonable despatch, and it would be impossible for the receiver on taking possession to discharge "forthwith" a debt of which he had no notice until several months afterwards.

The claim cannot be put higher than this, that the extra rate must be "deemed to have been payable" under s. 264 of the Companies Act, 1929. It was not payable when the receiver was appointed, or within twelve months before his appointment. There is nothing in s. 264 to bring in sums which some other Act may say should be deemed to be payable. The amendment of the valuation list under s. 37, sub-s. 10, of the Rating and Valuation Act does not affect the rate.

[Counsel referred to *In re Glyncorrwg Colliery Co., Ld.* (3) and *Kershaw, Leese & Co., Ld.* v. *Stockport Overseers.* (4)]

Trustram Eve for the Corporation of Bradford. This is a point of great importance to all rating authorities, and applies to every case where there is any delay in proceeding. The total amount of preferential liability can only be one year's assessment. When the decision in *Kershaw, Leese & Co., Ld.* v. *Stockport Overseers* (4) was given the whole position of retrospective payments was quite different from what it is now. Until the Union Assessment Act, 1862, there was no such thing as an assessment committee, and the only appeal against the rate was to quarter sessions. Since the Union Assessment Committee Amendment Act, 1864, there has been no amendment in the machinery set up until 1925.

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(1) (1886) 12 App. Cas. 1, 5, 6.
(2) [1891] A. C. 401, 409.
(3) [1926] Ch. 951.
(4) [1923] 2 K. B. 129.

Under the various rating Acts a rate is to become due and payable on the date when it is in fact made and published. As soon as the rate is levied it is the duty of the party rated to seek out the collector and to pay it: *Kershaw, Leese & Co., Ld.* v. *Stockport Overseers.* (1) Therefore, under the Rating and Valuation Act, 1925, the additional rate became retrospectively payable on April 1, 1931: see Ryde on Rating, p. 1031. Rating and Valuation Act, 1925, s. 37, sub-s. 10, making any amendment of the valuation list date back to the commencement of the period in respect of which the rate was made, i.e., April 1. Under s. 36, sub-s. 2, where the list is amended and the rate is altered in consequence, the difference, if too much has been paid, is to be repaid or allowed, and if too little it is to be paid and may be recovered as if it were arrears of the rate. The effect of these provisions must be imported into the construction of s. 264 of the Companies Act, 1929. The additional rate imposed by the cancellation of the derating of the company's premises became payable as from April 1, when the original unamended rate was levied, and was, therefore, in fact "due and payable within twelve months of the relevant date": see also s. 2, sub-ss. 1, 2 and 3, of the Rating and Valuation Act, 1925. The amendment of the valuation list automatically alters the rate.

Philip Sykes replied.

Cur. adv. vult.

May 3. EVE J. [after stating the facts as above:] The relevant sections of the Companies Act, 1929, are those numbered 78 and 264. By the former it is provided that where in the case of a company registered in England—I am only reading the appropriate words—a receiver is appointed on behalf of the holders of any debentures of the company secured by a floating charge, then if the company is not at the time in course of being wound up the debts which in every winding-up are under the provisions of Part V. of the Act relating to preferential payments to be paid in priority to all other debts shall be paid out of any assets coming to the hands of the receiver in priority to any claim for principal or interest in respect of the debentures. And the periods of time mentioned in Part V. are to be reckoned from the date of the appointment of the receiver. And by s. 264 it is enacted that in a winding-up there shall be paid in priority to all other debts (inter alia), all parochial or other local rates due from the company at the relevant date and having become due and payable within twelve months next before that date.

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(1) [1923] 2 K. B. 129.

It is, I think, obvious from the facts and dates already stated that the increased rate did not become due and payable before January 28, 1931, if to the words "due and payable" are to be assigned their ordinary meaning. A rate is due and payable as soon as it is made and published: *Davis* v. *Burrell* (1), and in *Kershaw, Leese & Co., Ld.* v. *Stockport Overseers* (2) Greer J. held that an amended rate became due and payable when the overseers amended the rate after the Assessment Committee had altered the valuation and not before.

The question, therefore, is whether there are any statutory provisions outside the Companies Act, 1929, which are effective to impose on the words "having become due and payable" in s. 264 an extended meaning sufficient to include an amended rate made upon an alteration of the valuation months after the expiry of the relevant twelve months. I do not think it is necessary for me to go in great detail through the statutes to which I have been referred. Admittedly they contain provisions by which amendments are made to relate back to the making of the rate or to the happening of events bringing about changes calling for the revaluation of particular hereditaments or to some specially appointed day, but I cannot find anything to indicate that these provisions were to have any wider operation than to make the amendments retrospective for the purposes of these particular statutes.

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(1) (1851) 10 C. B. 821.

(2) [1923] 2 K. B. 129.

The first I will refer to is the Rating and Valuation Act, 1925, by which (s. 1) the council of every county borough is to be the sole rating authority for the borough and every general rate is to be a rate at a uniform amount per pound on the rateable value of each hereditament in the rating area. Sect. 2, sub-s. 3: Every rate made by a rating authority is to be deemed to be made on the date on which it is approved by the authority. Sect. 4, sub-s. 1, Part II. of the Act, which has to do with the valuation, provides for the constitution of assessment areas, for each of which there is to be an assessment committee, and for the making of a valuation list for every rating area: ss. 16, 17 and 19. The next few sections relate to the contents of the valuation list, the manner in which the rateable values are to be ascertained and the preparation of a draft valuation list for each area, a copy of which is to be transmitted forthwith to the assessment committee. Sects. 26 and 27, and Parts II. and III. of the Fourth Schedule to the Act deal with objections to the draft valuation list, and by s. 28 the assessment committee are to approve the draft list and append thereto a declaration of approval and certificate of compliance with the Act, and the draft list finally approved and sent to the rating authority shall be the valuation list for the rating area, and, unless the contrary is proved, be deemed to have been duly made in accordance with the Act. By s. 31, any person who appears before the assessment committee on the consideration of an objection made before the committee may, if he is aggrieved by the decision of the committee on the objection, appeal against the decision to quarter sessions, and if as a result of such appeal it becomes necessary to make any alterations in the valuation list, s. 35 provides that the assessment committee shall cause such alterations to be made in the valuation as are specified in any statement sent to the committee with respect to a decision, award or judgment given on an appeal under the Act, and shall also cause such alteration of totals to be made as is consequential on any such alteration. And then by s. 36, sub-s. 1: "Any rate in respect of which the valuation list is conclusive shall be made and levied in accordance with the valuation list in force for the time being, and shall be collected and be recoverable, notwithstanding any appeal which may be pending with respect to that list" ; and sub-s. 2 : "Where in pursuance of the last preceding section of this Act"—that is s. 35—"there is made in the valuation list an alteration which affects the amount of any rate levied in respect of any hereditament in accordance with the list, the difference, if too much has been paid, shall be repaid or allowed, or, if too little has been paid, shall be paid and may be recovered as if it were arrears of the rate." Sect. 37 empowers any person (including the county valuation committee and any local authority) who is aggrieved by the incorrectness or unfairness of any matter in the valuation list for the time being in force to make a proposal for the amendment of the list; and (sub-s. 10) an amendment made in pursuance of the section shall be deemed to have had effect as from the commencement of the period in respect of which the rate was made and the provisions of sub-s. 2 of s. 36 shall have effect accordingly. By s. 70 of the Local Government Act, 1929, this sub-s. 10 (which determines the date as from which amendments in valuation lists made under that section are to have effect) was amended by the addition thereto of the proviso that in the case of an amendment made on or after October 1, 1929, by reason of any hereditament having (inter alia) ceased to be an industrial hereditament, the amendment is to have effect only as from the date when the hereditament ceased to be such a hereditament, and by sub-ss. 3 and 4 of s. 1 of Part II. of the Ninth Schedule to the Act, which deals with the amendment of special lists prepared for derating purposes, it is provided that any amendment of a special list made in consequence of any objection lodged which is not determined until after September 30, 1929, shall be deemed to have been made on that date and shall have effect as if made in consequence of a proposal for amendment served upon the rating authority on or before September 30, 1929.

It cannot be doubted that the net result of the foregoing provisions is to treat all amendments as though they had been part of the original assessments, and to give effect to the result thereby brought about by adjustment of the account between the ratepayer and the authority, but, as I have already intimated, it is difficult in the absence of any express language to attach any wider operation to them. Under the combined effect of ss. 78 and 264 of the Companies Act, rates, in order to have priority of payment, must fulfil two conditions: they must be due from the company at the date when the receiver is appointed and must have become "due and payable" within twelve months next before that date. Now, assuming that the provisions of the rating Acts operate to make this increased rate due at the relevant date in that by relation back the increased figures must be treated as included in the assessment of April, 1930, they cannot, in my opinion, be held to make the increase "due and payable" within the twelve months in any case where the increased figure has not been ascertained until after the expiry of the twelve months. The company, in common with other ratepayers, cannot dispute the liability to pay the increased demand, as it is to be deemed to have had effect from April, 1930, but, as it was not in fact due and payable within the relevant twelve months, no claim to have it treated as a preferential payment can, in my opinion, be successfully asserted.

Accordingly I declare that the claim of the Corporation to be preferential creditors in respect of the additional rate mentioned in the summons cannot be sustained, and they must pay the costs of the application.

H. L. L.

C. A. The Bradford Corporation appealed. The appeal was heard on May 24 and 25, 1932.

Montgomery K.C. and *Trustram Eve* for the appellants.
Norman Daynes K.C. and *Philip Sykes* for the respondent.

LORD HANWORTH M.R. This is an appeal from a decision of Eve J. upon the question whether an amount payable in respect of local rates is to be paid in priority to all other debts of a company by a receiver appointed in the first place under the powers of debenture holders and subsequently by the Court.

The facts can be shortly stated. The Airedale Garage Company, Ld., are a company carrying on business within the area for which the Bradford Corporation are the rating authority. They had issued debentures, and the Anglo-South American Bank, Ld., were the holders of these debentures. On January 28, 1931, the bank, in exercise of the power contained in their debentures, appointed Mr. George Walker receiver of the defendant company's assets and undertaking. This action was then commenced, and by an order made in this action on February 6, 1931, Mr. George Walker was appointed receiver and manager of the company's assets and business. At the time when Mr. George Walker took up his duties he found that there were bailiffs in possession of the company's premises, claiming a sum of 676*l.* 1*s.* 11*d.* in respect of unpaid rates. Those unpaid rates covered a very considerable period of time, and, as no arrangement could be made, the receiver and manager paid that sum. The question that arises in the present case is whether or not the Bradford Corporation are entitled to preferential payment in respect of a sum of 84*l.* 5*s.* 2*d.*, due in respect of a period from April 1, 1930, to January 28, 1931. The receiver has paid the rates for his occupation between the dates of January 28 and March 31, 1931, but the Bradford Corporation had made a rate for the year which began on April 1, 1930, and ended on March 31, 1931. A claim was made in respect of some of the premises under what is known as the Derating Act (Local Government Act, 1929). That Act was passed, as its title shows, to grant complete or partial relief from rates in the case of hereditaments to which that Act applies, and at the relevant time immunity had been granted to the company as to part of the rates on certain premises. The question whether that immunity had been properly allowed was disputed, and the proper steps were taken to have the matter determined. The determination of the issue was, however, delayed, because at that time a number of derating cases were being taken to the Court of Appeal upon cases stated, and from the Court of Appeal to the House of Lords; and it was not until after some of those cases had been heard by the House of Lords that the question involved in the dispute could be determined. But on September 25, 1931, the objection which the rating authority had made to the relief given to the company was upheld, and it was decided that the company was not entitled to relief in respect of derating to an amount which for the period from April 1, 1930, to January 28, 1931, was the sum of 84*l.* 5*s.* 2*d.* Notice of that decision was given on September 28, 1931, and demand for payment was served on November 15, 1931.

It will be observed that the receiver took possession on January 28 of that year, and his duty was to deal with debts due from the company in accordance with the terms of s. 78 of the Companies Act, 1929. Sect. 78, sub-s. 1, provides: "Where, in the case of a company registered in England, either a receiver is appointed on behalf of the holders of any debentures of the company secured by a floating charge, or possession is taken by or on behalf of those debenture holders of any property comprised in or subject to the charge, then, if the company is not at the time in course of being wound up, the debts which in every winding-up are under the provisions of Part V. of this Act relating to preferential payments to be paid in priority to all other debts, shall be paid out of any assets coming to the hands of the receiver or other person taking possession as aforesaid in priority to any claim for principal or interest in respect of the debentures." It will be seen from the facts I have stated that s. 78 applied, and it was therefore the duty of the receiver to follow the provisions as to preferential payments which are laid down in Part V. of the Companies Act; that is, to be precise, in s. 264, which provides in sub-s. 1 that in the winding-up of a company "there shall be paid in priority to all other debts"—all parochial or other local rates, assessed taxes, land tax, property or income tax, wages or salary of any clerk or servant and other debts. All these debts are to be marshalled and paid in accordance with the priority given to them by

s. 264. With regard to local rates it is provided that the local rating authority shall have priority up to a certain quantum. Priority is to be given to "All parochial or other local rates due from the company at the relevant date"—"the relevant date" being the date of the appointment of the receiver, January 28, 1931—"and having become due and payable within twelve months next before that date." Those words are put in to restrict the amount for which priority is given. It is not priority in respect of all the debts for local rates which may be outstanding at that time: the priority is in respect of only such rates as became due and payable within twelve months before, in this case, January 28, 1931.

It having been held in September, 1931, that too much relief had been given to the company under the Derating Act, 1929, so that the measure of their liability to rates had been under-estimated for the period from April 1, 1930, to January 28, 1931, by this sum of 84*l.* 5*s.* 2*d.*, the receiver contested his liability to pay that sum in priority to the debentures, because it was determined that he was liable to pay that amount only on September 25, 1931, and that was not within the period of twelve months before the relevant date, January 28, 1931. Against this it is said by the rating authority that, although that is true, the determination of that liability was in respect of the rates which fell to be paid between April 1, 1930, and the date of the appointment of the receiver, and that by the terms of the rating statutes that liability is thrown back to the period during which the duty to pay rates accrued. There is no question that the sum in question is part of the additional rate made for the period from April 1, 1930, to March 3, 1931, and that this part is in respect of the period from April 1, 1930, to January 28, 1931. There is no other period to which that sum of 84*l.* 5*s.* 2*d.* can be related; it arises out of the liability subsisting upon the company during that period that I have spoken of. It is true, however, that it was not measured finally until a date which was subsequent to the twelve months referred to in s. 264, sub-s. 1 (*a*). It is therefore necessary to consider what is the meaning of these words "due and payable" in s. 264, sub-s. 1 (*a*).

Certain principles may be recalled which are quite clear. One is that a rate duly made and published is immediately payable. Sir John Jervis, Chief Justice of the Common Pleas, in deciding the case of *Davis* v. *Burrell* (1) said: "When a rate is duly made and published, it is the duty of the parties assessed to seek out the collector and to pay it," and he contrasts that duty so imposed upon them with the position under the statute 43 Eliz. c. 6, which provides that before recovering rates by distress it is necessary to make a personal demand; but there is no such requirement in order to set up the direct liability of the ratepayer to the rating authority. The other members of the Court say the same thing. That case was referred to in *Kershaw, Leese & Co., Ld.* v. *Stockport Overseers* (2) by Greer J. as establishing quite clearly the principle that as soon as the rate is properly made and published it has become payable by the ratepayer.

The Rating and Valuation Act, 1925, consolidated a number of rating Acts, and it contains sections dealing with the situation created where there has been a change in the amount of the rate to be paid by a revision of the current lists. We all know that the assessment or the rating of a particular person may be contested, and that upon proper steps being taken there may be a revision. In the case of a revision of the current lists it is provided by s. 37, sub-s. 10, of the Act of 1925 that "an amendment made in the valuation list in pursuance of this section shall, in relation to any rate current at the date when the proposal in pursuance of which the amendment was made was served on the rating authority, ... be deemed to have had effect as from the commencement of the period in respect of which the rate was made, and shall . . . . have effect for the purposes of any subsequent rate, and the provisions of sub-section (2.) of the last preceding section of this Act shall have effect accordingly." The sub-section that is there indicated says: "Where in pursuance of the last preceding section of this Act there is made in the valuation

(1) 10 C. B. 821, 826.

(2) [1923] 2 K. B. 129, 135.

list an alteration which affects the amount of any rate levied in respect of any hereditament in accordance with the list, the difference, if too much has been paid, shall be repaid or allowed, or, if too little has been paid, shall be paid and may be recovered as if it were arrears of the rate." I need not refer to any other sections, but those two are plain to show that in the case of a revision the amendment is to have effect as from the commencement of the period in respect of which the rate was made; and the consequential provision is to be operative that the ratepayer shall either receive the margin which remains above what he ought to have paid or pay what he has failed to pay when the ascertainment of his liability is finally reached.

That being so, let me once more turn to the section in the Companies Act, 1929. It is clear that this rate became due when it was made, and it was operative from April 1, 1930. It was due and ought to have been paid under the old law, as established in the case I have referred to, at any time from April 1 onwards; and more than that, any change in the assessment to the rate took effect as from April 1, 1930. But it is said that the change in the rate that was made in this case was not on a mere proposal for the amendment of the list; the revision arose here from a reduction in the special relief granted by the Derating Act. The Derating Act, the Local Government Act, 1929, contains a material provision in the Ninth Schedule, Part II., para. 1, sub-para. 4, and here I am dealing with a special list which is to be made in relation to the hereditaments which are to be granted complete or partial relief from rates. Para. 1, sub-para. 4, provides that the gross value and the net annual value in respect of any hereditament in a special list for any rating area outside the County of London, when approved, shall be taken to be the gross value and the net annual value of that hereditament for the purposes of the current valuation list; "and, accordingly, the assessment committee, upon approving the special list and thereafter upon making any amendment thereof, shall make or cause to be made in the valuation list the necessary amendments (including any necessary amendments of rateable values), and those amendments shall have effect as if made in consequence of a proposal for the amendment of the valuation list served upon the rating authority on or before the thirtieth day of September, nineteen hundred and twenty-nine." The words are a little special, but they are drawn for the purpose of fitting that variation of the special list into the revision of the current lists under s. 37 of the Act of 1925, because sub-s. 10 refers to "the proposal in pursuance of which the amendment was made" and its service on the rating authority. We therefore find that the amendments to the special list are to be embodied in the valuation list and to have effect as if made in consequence of a proposal for the amendment of valuation lists served upon the rating authority: in other terms, para. 1, sub-para. 4, of Part II. of the Ninth Schedule to the 1929 Act makes the changes in respect of the special list to fit exactly into sub-s. 10 of s. 37 of the Rating and Valuation Act, 1925; and by that sub-section these alterations are to be deemed to have had effect as from the commencement of the period in respect of which the rate was made. The rate was made on April 1, 1930, and at that time it became due and payable. The alteration that has been made subsequently in September of the year 1931 is to be deemed to have had effect as from the commencement of the period in respect of which the rate was made. Under those circumstances, it seems quite plain that the sum in contest in the present case must be appropriated to the period commencing April 1, 1930, and that period alone, and although ascertained at a later date, it none the less belongs to and is founded upon the liability to rates during that period and no other.

I find myself, therefore, unable to give such a limited meaning to the provisions in the rating Acts to which I have referred as Eve J. has done. I think the words "due and payable" in s. 264 of the Companies Act are meant to refer to a liability in respect of which there had to be a payment, and the particular debt for additional rates must be deemed to have become due and payable within the period of the twelve months next before the relevant date.

The result is that the appeal must be allowed, and that the Bradford Corporation are entitled to be paid this sum. Eve J. has set out the dates and facts in succinct order, and has gone through the sections, so that I have not troubled to go through them again with the same precision as he has done. The conclusion to which I have come is different from his, because I cannot give a restricted meaning to these retrospective sections of the rating Acts. I do not think that they were intended to have effect only for the purposes of these Acts; they were to have an effect upon debts for rates as a whole, and where one finds that the debt has been appropriated to a particular period one must deal with it as such, and see whether in that character it falls within the limitations of s. 264, sub-s. 1 (*a*).

For these reasons the appeal will be allowed with costs, and an order will be made for the payment of the 84*l*. 5*s*. 2*d*. to the City of Bradford.

LAWRENCE L.J. I agree. The question on this appeal is whether a sum of 84*l*. odd in respect of rates for the period from April 1, 1930, to January 28, 1931, assessed in consequence of an increase of rateable value of part of the property belonging to the defendant company, ought to be paid by the receiver appointed on behalf of the debenture holders in priority to any claims for principal or interest in respect of the debentures under the joint operation of ss. 78 and 264 of the Companies Act, 1929. The answer to that question depends upon whether the sum was part of a rate which had become due and payable within twelve months next before the appointment of the receiver.

The learned judge, after a careful and accurate review of the relevant provisions of the Rating and Valuation Act, 1925, and of the Local Government Act, 1929, has come to a conclusion stated in the following words: "It cannot be doubted that the net result of the foregoing provisions is to treat all amendments as though they had been part of the original assessments." I agree both with the summary made by the learned judge of the relevant provisions of the Acts

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and with the conclusion at which he has arrived as the result of that summary. I do not propose, therefore, to travel through the various sections of the Act again, but content myself with expressing my entire agreement with the conclusion reached by the learned judge.

Now what is the result of having arrived at that conclusion? The learned judge rightly states that in order to give effect to the statutory provisions to which he has referred the Legislature provides that the account between the ratepayer and the authority is to be adjusted. But the question is, how is that adjustment to be made in the present case? In my opinion, the Act of 1925 has not left it open to doubt how the sum in question ought, in the circumstances, to be treated by the receiver. Sect. 36, sub-s. 2, of the Act of 1925 provides how that sum is to be paid. That sub-section, although in terms applying only to an alteration made in the valuation list in pursuance of s. 35, is by sub-s. 10 of s. 37 made applicable to amendments of the valuation list under that section, and is, therefore, applicable to the sum in question in this case. Sub-s. 2 of s. 36 provides that where the amendment "affects the amount of any rate levied in respect of any hereditament in accordance with the list"—that is this case—"the difference, ... if too little has been paid, shall be paid . . . . as if it were arrears of the rate," meaning thereby arrears of the rate originally made, and accordingly, as the sum of 84*l.* is to be paid under that statutory provision as if it were an arrear of the original rate, it comes, in my judgment, directly within the provisions of s. 264 of the Companies Act, 1929. Any arrear of a rate which had become due and payable within twelve months next before the date of the appointment of the receiver was an arrear which was due and payable during that period; and, as the increase in the rate was expressly made part of the original rate, it was necessarily "due and payable" within the period mentioned.

The learned judge has acceded to Mr. Daynes' argument that if the words "having become due and payable within twelve months next before" the appointment of the receiver are read in the strictly literal sense, the sum in question did not come within the true meaning of those words. In my judgment that argument is not well founded, as the Legislature has expressly enacted that an increase of the rates resulting from an amendment of the valuation list under s. 37 shall be treated as if it had formed part of the original rate, and shall be paid accordingly, and therefore it is plain that in order to give full effect to that statutory enactment the increased sum must be treated as part of the original rate which had admittedly become due and payable within the specified period.

For these reasons I think that the appeal ought to be allowed, with the consequence indicated by my Lord.

ROMER L.J. I have arrived at the same conclusion. It is, in my opinion, impossible for the respondents to escape from the operation of the plain words contained in sub-s. 10 of s. 37 of the Rating and Valuation Act, 1925. That sub-section says that an amendment made in a valuation list in pursuance of the section shall, in relation to any rate current at the date therein mentioned, be deemed to have had effect as from the commencement of the period in respect of which the rate was made. Now if the amendment subsequently made in the valuation list had had effect on April 1, 1930, it is plain that the sum of 84*l.* 5*s.* 2*d.* now claimed by the City of Bradford would have been due and payable within twelve months of January 28, 1931. That being so, the effect of the sub-section is that that sum must be deemed to have been payable within the twelve months. It is said by Mr. Daynes, I have no doubt accurately, that it is only as between the rating authority and the ratepayer that the sum is to be deemed to become due and payable at a date antecedent to the date when the amendment was in fact made. But, if, as between the defendant company and the rating authority, this money is to be deemed to have become due and payable on April 1, 1930, then it is a debt of the company which, in the event of the company having gone into liquidation on January 28, 1931, was given priority by s. 264 of the Companies Act, and that being so, it is a sum which the

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receiver, by virtue of s. 78, was bound to pay in priority to any payments made by him to the debenture holders.

For these reasons this appeal should in my opinion be allowed, with the consequences that have been indicated.

Appeal allowed.

Solicitors: *Torr & Co., for Norman L. Fleming, Town Clerk, Bradford; Jaques & Co., for A. Gaukroger, Bradford.*

H. C. G.

MAUGHAM J.
1932
June 24.

In re MONRO'S SETTLEMENT.

MONRO *v.* HILL.

[1932. M. 1330.]

Marriage Settlement—Trust for Payment of Income to Wife after Husband's Death "during her life or until she shall marry again"—Dissolution of Marriage—Re-marriage of Wife while Husband still living—Wife's Interest not forfeited by Re-marriage.

By a marriage settlement property therein called "the husband's fund" was assigned to the trustees on trusts which provided that from and after the husband's death the trustees should pay the income of the husband's fund to the wife, if she should survive the husband, "during her life or until she shall marry again. . . ." The settlement provided also that from and after the husband's death and the wife's death or re-marriage the trustees should stand possessed of the husband's fund and the income of it in trust for the issue of the marriage as the husband and wife should by deed jointly appoint, or in default of and subject to any such appointment as the survivor of them should by deed or will appoint, and in default of and subject to any such appointment by the survivor in trust for the child or children of the marriage as therein mentioned. The marriage was dissolved in 1916 upon the wife's petition. The wife married again in 1930. In 1932 the husband died:—

Held, that the words "until she shall marry again" must be construed to mean a marriage entered into by the wife after the husband's death, and that the wife was therefore entitled to the income of the husband's fund (until she should marry again) and could still exercise the power of appointment over the husband's fund given to her as survivor of the husband and herself.

Fitzgerald v. *Chapman* (1875) 1 Ch. D. 563 referred to.

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MONRO'S SETTLEMENT, *In re.* MONRO *v.* HILL.

ADJOURNED SUMMONS.

By a settlement (hereinafter called "the marriage settlement") dated December 3, 1903, and made in contemplation of the marriage of Harold Edward Monro (hereinafter called "the husband") and Dorothy Elizabeth Browne (hereinafter called "the wife") the husband assigned certain property to the trustees thereof. The marriage settlement provided that after the solemnization of the marriage the trustees should hold that property and a policy of assurance mentioned in the marriage settlement and the moneys payable thereunder (all of which premises and the property for the time being representing the same were thereinafter and are hereinafter called "the husband's fund"), upon trust to pay the income thereof as therein mentioned during the husband's life. The marriage settlement provided also that the trustees thereof should, if the marriage should be solemnized, procure a legacy of the wife under the will of her grandfather (which legacy and the moneys, stocks, funds and securities for the time being representing it were thereinafter and are hereinafter called "the wife's fund") to be paid to them as soon as payment of it could be obtained and should invest it as therein mentioned. At the date of the marriage the wife was a minor.

Clause 3 of the marriage settlement provided that from and after the husband's death the trustees should pay the annual income of the husband's fund to the wife if she should survive the husband "during her life or until she shall marry again or unless or until she after attaining the age of 21 years shall on being applied to in writing by the trustees refuse or neglect to adopt and confirm the settlement purporting to be effected by these presents of her aforesaid contingent legacy under the will of her grandfather. . . . ." Clause 5 provided that from and after the solemnization of the marriage the trustees should during the joint lives of the husband and wife pay the income of the wife's fund to the wife for her separate use and from and after the death of either the husband or the wife should pay the income thereof to the survivor of them during his or her life but so that if the husband should be the survivor it should be payable to him only until he should marry again and so long as the trust thereinbefore declared in his favour for payment to him of the income of the husband's fund should be subsisting. The clause further provided that if that trust should not be subsisting or should discontinue otherwise than by the husband's death or marriage the income of the wife's fund should, during the remainder of the husband's life, be applicable in the manner in which it would be applicable if the husband were dead. Clause 6 provided that, after the husband's death and the wife's death or re-marriage, the trustees should stand possessed of the husband's fund and the income thereof in trust for the issue, whether children or more remote, of the marriage, born within the lives of the husband and wife or the life of the survivor of them, as the husband and wife should by deed jointly appoint, and in default of and subject to any such joint appointment as the survivor of them should by deed or will appoint, and in default of and subject to any such appointment in trust for the child or children of the marriage who being a son or sons should attain the age of twenty-one years, or being a daughter or daughters should attain that age or marry, in equal shares. By a deed dated May 25, 1906, the wife, being then of full age, confirmed the marriage settlement.

Upon the wife's petition a decree nisi of dissolution of the marriage was pronounced on April 10, 1916, and was made absolute on October 16, 1916: and by an order of the Probate, Divorce and Admiralty Division dated March 12, 1918, it was ordered that the marriage settlement and the deed of May 25, 1906, should be varied by extinguishing all the husband's rights, powers and interests in the wife's fund as though the husband were then dead. The order did not affect the trusts of the husband's fund. There was one child only of the marriage, a son born on December 17, 1904.

By a voluntary settlement executed on October 3, 1929, the son assigned to the trustees thereof all his interest in reversion expectant on the deaths of the husband and wife in the husband's fund, to hold the same upon the trusts thereinafter declared. The wife married again on December 3, 1930, before the death of the husband, who died on March 16, 1932. By this summons the trustees of the marriage settlement asked (inter alia): (i.) whether the income of the husband's fund was, as from the husband's death, payable to the wife during her life until she should again marry, and (ii.) whether the power of appointment over the husband's fund given to the wife as the survivor of the husband and herself was any longer exercisable by her.

Vanneck for the trustees of the marriage settlement.

Belsham for the wife. On the true construction of the clause the words "from and after the death . . . ." govern the whole of what follows, so that the wife's interest does not arise until the husband's death and continues until she determines it by re-marrying or, after attaining the age of twenty-one, by refusing to do certain things. The divorce proceedings have no effect whatever on the beneficial interests of the parties: see *Fitzgerald* v. *Chapman.* (1) Nor have they any effect upon the wife's power of appointment as survivor of herself and her husband. Divorce is not a contingency within the contemplation of the parties to a marriage settlement when the settlement is executed. In *In re Muggeridge's Trusts* (2) the rents of real estate were payable under a marriage settlement to the wife for life, and after her death to the husband until he should become bankrupt or insolvent, and after the death or bankruptcy or insolvency of the husband the real estate was to be held upon trusts for the benefit of the children of the marriage. It was held that upon the insolvency of the husband during the wife's life the gift over to the children took effect. But in the present case, as divorce cannot have been contemplated at the time when the marriage settlement was executed, the phrase "during her life or until she shall marry again" cannot be read so as to import into it the intention that divorce should cause a forfeiture of the interest. In *In re Chapman* (3) the decision, as stated in the first paragraph of the headnote, was that "the rule recognized in *Metcalfe* v. *Metcalfe* (1), that a forfeiture clause in a will, providing that, in the event of alienation by or the bankruptcy of a legatee, his interest under the will 'shall thenceforth cease and determine,' applies to acts of forfeiture after the date of the will in the testator's lifetime as well as to acts after his death, ought not to be applied to any but those particular acts of forfeiture, and ought not, in the absence of express words, to be extended to other acts of forfeiture, e.g., a marriage of a kind forbidden by the testator." *In re Pilkington's Settlement* (2) also shows the attitude of the Court to cases of this character. In *In re Crawford's Settlement* (3) a sum of 10,000*l.* was to be held, in the event of there being no issue of the marriage, in trust for the wife, her executors administrators and assigns "if she shall survive her now intended coverture," and it was further provided that should she die during the coverture, the money should be held in trust for the wife's father, his executors, administrators and assigns. There were no children of the marriage, which was dissolved on the husband's petition. At the date of the decision the wife's father was dead, and the husband and wife were alive, and the decision, as stated in the last paragraph of the headnote, was that "the words 'survive her now intended coverture' could not be read as equivalent to 'survive her husband,' and that as the coverture had determined by the divorce the lady had 'survived' the coverture, and was, therefore, absolutely entitled to the 10,000*l.*" In the present case the wife, in order to incur a forfeiture, must survive her husband and marry again after his death. Therefore the event depriving her of her life interest has not happened.

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(1) 1 Ch. D. 563.

(2) (1860) Johns. 625.

(3) [1904] 1 Ch 431.

Laurence Tillard for the son and the trustees of the voluntary settlement. The condition upon the fulfilment of which the wife's life interest is to determine has been fulfilled. Upon its true construction, clause 3 of the marriage settlement, which settles the husband's fund, makes it clear that he wished to avoid providing for another man's wife, i.e., that he wished the wife's interest in the husband's fund to determine should his marriage with her be dissolved, in which event she might marry again. The Court ought to apply the principle of *In re Muggeridge's Trusts.* (1) The wife has now no interest whatever in the income of the husband's fund. There is no reason why the word "again" in the phrase "or until she shall marry again" should be referred to a period after the husband's death. It is properly referable to the marriage in contemplation of which the marriage settlement was executed, and all that clause 3 does is to indicate what the husband desired to happen to the income of the husband's fund after his death. The wife's life interest in that income has therefore ceased.

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(1) [1891] 3 Ch. 1.

(2) [1923] W. N. 188.

(3) [1905] 1 Ch. 11.

MAUGHAM J. [after stating the facts :] There seems to be no direct authority on this point. The question which arises is, what is the true effect of clause 3 ? Has the wife married again within its meaning, or is the clause confined to the event of her marrying again after the husband's death ? This is a case in which the Court must construe the clause knowing that an event has happened which the parties to the settlement never contemplated. Certain legal principles apply to the case. It is established by *Fitzgerald* v. *Chapman* (2) that a marriage settlement, in so far as it is not varied by a judgment or order of the proper tribunal, remains unaffected by a decree of dissolution of marriage and may be enforced for the benefit of an innocent or guilty divorced person, and that it must be construed without any bias (one way or the other) in favour of the view that a divorced spouse is not prima facie expected or intended to take any benefit out of the property of the other party to the settlement. In that case property was settled upon trust for the wife during the joint lives of herself and her husband, and, after her decease, for him for his life, and then upon trusts for the children of the marriage. The property was brought into settlement by the wife and her father, and the marriage was dissolved on her petition : and it was held that the husband's

(1) Johns. 625.

(2) 1 Ch. D. 563.

life interest on the wife's decease had not been forfeited by the dissolution. That decision has been constantly recognized as stating a correct view of the law. I may mention, also, two of the most recent decisions on the point—namely, that of Kekewich J. in *In re Crawford's Settlement* (1) and that of Eve J. in *In re Pilkington's Settlement.* (2) The result of the decision in *In re Chapman* (3), is that cases dealing with forfeiture of interests in the event of alienation or bankruptcy are in a different category from the case which is now before me, and ought not to affect my mind in considering the question which I have to decide.

Turning back to the clause in question in the present case, I must, I think, without prejudice either way, determine the literal meaning of the words " . . . . from and after the death of the said Harold Edward Monro the trustees shall pay the annual income of the husband's fund unto the said Dorothy Elizabeth Browne if she shall survive the said Harold Edward Monro during her life or until she shall marry again. . . . ." The trust arises only upon the death of the husband, and the words " until she shall marry again " are words of futurity, prima facie applying only to marriage after the husband's death. On this simple ground I hold that the marriage which has taken place during the first husband's life does not come within those words. I may add that the same rule must be applied to the construction whether it is upon the husband's or the wife's petition that the marriage is dissolved. I can conceive cases in which the innocent party would be suffering very great injustice if, by reason of the necessity for obtaining a divorce occasioned by the conduct of the guilty party, it were to be held that the innocent party could not marry again, possibly for many years, without forfeiting an existing life interest which might have been provided as part of the bargain made upon the marriage. Further, a case might arise in which the innocent party had married again after divorcing the guilty party and where the second spouse had died before the guilty party. Would it be reasonable in

(1) [1905] 1 Ch. 11.
(2) [1923] W. N. 188.
(3) [1904] 1 Ch. 431.

that case to hold that a clause in the words of clause 3 of the will before me has the effect of taking away the life interest of the innocent party ? There are a number of similar points with which I might have to deal were I not putting aside considerations of prejudice. For the reason above stated I come to the conclusion that the income of the husband's fund is payable to the wife until she shall marry again.

[His Lordship then held that the power of appointment over the husband's fund given to the wife as survivor of the husband and herself was still exercisable by her.]

Solicitors: *Monro, Saw & Co.; Reid Sharman & Co.; Boyce, Evans & Sheppard.*

K. R. A. H.

ATTORNEY-GENERAL *v.* CORKE.

BENNETT J.
1932
July 25, 26, 27, 28, 29.

[1932. A. 1488.]

Nuisance—Land occupied by caravan dwellers—Interference with comfort of neighbours—Duty of landowner—Injunction.

The owner of a disused brickfield allowed persons to bring caravans on to the field and to live in them there at a weekly rent. Some of the occupants of the caravans committed acts on the land in the neighbourhood of the field which amounted to a nuisance and a menace to the health of the neighbourhood, such as depositing human excrements, breaking down fences, trespassing and permitting their horses to trespass on the adjoining land, and creating disturbances by noise in the neighbourhood of the property:—

Held, that the owner of the field was bound to prevent the occupants from committing the acts in question.

Injunction granted restraining him from permitting the occupants to commit those acts.

Rylands v. *Fletcher* (1868) L. R. 3 H. L. 330 applied.

WITNESS ACTION.

The following statement of facts is taken from his Lordship's judgment:—

The plaintiffs are His Majesty's Attorney-General (at the relation of the Bromley Rural District Council) and the Bromley Rural District Council, who complain that the defendant has done, in the area over which the Bromley Rural District Council has authority, acts which amount to a public nuisance. The matter began in the year 1930. The defendant in that year was, and at the present time is, the owner of a disused brickfield which has an area of 11 acres in the parish of St. Paul's Cray within the Rural District of Bromley. About two years ago, in October, 1930, he began to license persons who live in caravans to place their caravans on this disused brickfield and to live in them there, charging the owners of the caravans, for the right to occupy his land in that manner, weekly sums ranging from 5*s*. to 10*s*.; and in course of time a considerable number of dwellers in caravans became occupiers of parts of this brickfield. At the beginning of 1932, according to the evidence, there were on the land as many as 59 caravans and sheds of a portable character, and six tents, occupied by persons who lead, some of them at any rate, a nomadic life; and the total population dwelling in this field in the month of March of this year was between 200 and 300 men, women and children. Until October, 1931, there were no sanitary conveniences of any kind provided by the defendant upon this field for the use of the people who lived there in caravans, but, as a result of proceedings taken by the Bromley Rural District Council, there were provided, in October, 1931, eight water-closets, all, I think, in one building, or at any rate in adjacent buildings at the southern side of this brickfield, four for the use of women and four for the use of men. There is an adequate and a wholesome supply of water upon the field—water which is obtained from a well sunk by the defendant, and which is pumped into a tank to which all the occupants come and get such water as they require for domestic purposes.

The plaintiff complains that the way in which these caravan-dwellers occupy the brickfield and their habits and methods of living constitute a serious menace to the health of the neighbourhood, it being alleged, for example, that they are in the habit of throwing slop water and depositing human excrement upon the ground and allowing the surface of the ground to be fouled by dogs and horses which come

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on to the ground; and it is also alleged that the caravan-dwellers, instead of using, for the purposes of nature, the water-closets which the defendant has provided, prefer to use, and do use, not the camp itself, but the adjoining land; and it is further alleged that by these acts the health of the neighbourhood is threatened. It is also alleged that the behaviour of the occupants of these caravans in other respects interferes with the neighbours' ordinary comfort and the enjoyment of their property, the acts complained of being the noise that they are accustomed to make when they return home to the camp on Saturday nights from the public-houses in the neighbourhood. It is said that on such occasions they are often in a quarrelsome and excitable condition and, being in that condition, fight, use bad language and otherwise behave in a disorderly manner, thus disturbing the occupants of houses by which they have to pass on their return at night to the encampment. It is also alleged that many of them have horses which they take no sufficient steps to keep under proper control, that these animals wander about and do damage to the property of small-holders living in the vicinity of the camp, and that, instead of using the ordinary way of approach to this camp which has been provided by the defendant, many of the occupants take the shortest way home and, regardless of the rights of the neighbours, trespass on the neighbours' property and break down the neighbours' fences for the purpose of getting to the caravans on the encampment in which they dwell.

Vaisey K.C. and *Charles R. R. Romer* for the plaintiffs. The nuisance is of a very serious character, and the plaintiffs are clearly entitled to an injunction against the defendant to prevent the land from being used by the caravan-dwellers in such a way as to be a nuisance or a menace to the health of the neighbourhood.

[They referred to *Attorney-General* v. *Stone* (1) and *Attorney-General* v. *Roe*. (2)]

Galbraith K.C. and *C. J. Parton* for the defendant. The defendant cannot be made responsible for acts done by the caravan-dwellers off the defendant's property. The exact nature of a public nuisance is stated in Kerr on Injunctions, 6th ed., p. 132, where reference is made to *Soltau* v. *De Held.* (1)

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(1) (1895) 12 Times L. R. 76.

(2) [1915] 1 Ch. 235.

[They also referred to *Attorney-General* v. *Brighton and Hove Co-operative Supply Association* (2); *Rex* v. *Moore* (3); *Rex* v. *Carlile.* (4)]

Vaisey K.C. in reply. If the defendant is unable to let the land to caravan-dwellers without the consequences ensuing of which complaint is made, he ought not to let the field to them at all. The plaintiffs can only ask for an injunction in general terms. The wrongful act of the defendant is the placing of caravans on the land.

[He referred to *Attorney-General* v. *Tod Heatley* (5); *Rylands* v. *Fletcher* (6); *Walker* v. *Brewster* (7); *Barber* v. *Penley* (8); *Lyons, Sons & Co.* v. *Gulliver* (9); *Burstein* v. *Gamages* (*West End*), *Ld.* (10); *Rex* v. *Cross* (11); and Kerr on Injunctions, 6th ed., p. 187.]

BENNETT J. The case, on the facts which have been proved, raises, I think, questions which are not altogether free from difficulty. [After stating the facts his Lordship continued:] I do not think that there is really any great dispute about the facts. I am satisfied that there are a number of acts committed by some of the persons who dwell in caravans on this encampment which endanger the health of those who live in the neighbourhood and which interfere with the ordinary comfort of those who live in the neighbourhood and with the enjoyment of their property. The question which causes me difficulty is, whether the defendant can be held responsible for the danger to the neighbours' health and the discomfort which the acts of these camp-inhabitants cause to their neighbours.

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(1) (1851) 2 Sim. (N. S.) 133, 142, 144.

(2) [1900] 1 Ch. 276.

(3) (1832) 3 B. & Ad. 184.

(4) (1834) 6 C. & P. 636, 642, 647.

(5) [1897] 1 Ch. 560.

(6) L. R. 3 H. L. 330.

(7) (1867) L. R. 5 Eq. 25.

(8) [1893] 2 Ch. 447.

(9) [1914] 1 Ch. 631.

(10) (1930) Times Newspaper, Dec. 10.

(11) (1812) 3 Camp. 224.

The acts which, I think, give rise to a danger to the health of the neighbourhood, are acts done, not on the defendant's land, but off it by people who live on it. It is that fact which gives rise to the difficulty I feel, in point of law, in holding the defendant responsible. I am satisfied that in point of fact a considerable number of the occupants of this camp, who live in caravans, instead of using the lavatories which the defendant has provided for sanitary purposes upon his camp, daily and as a regular habit use the adjoining land in circumstances and in a way which is most offensive to numbers of people who live in the vicinity. I am satisfied that these acts endanger the health of the neighbourhood. Uncovered human excrement may give rise to carriage of infection by flies and so forth, and so is a real danger to the health of the neighbourhood; and, in addition to that, owing to the fact that some of these caravan-dwellers are not very particular as to the way in which they perform operations that are usually performed in private, offence is caused to people who live in the neighbourhood and who cannot help seeing what goes on. I think the acts complained of would be committed even if the defendant increased the lavatory accommodation, because I think some of the occupants of this encampment would prefer not to use lavatories, but would use other places.

Other acts which have been proved are acts by men returning to the encampment late at night after the closing of the public-houses. Numbers of them urinate against the fences which are outside the camp before going to their caravans for the night. That, I think, is largely because the lavatories are at some distance from some of the caravans. Some of the caravans are as much as 100 yards away from the lavatories, and the lavatories are shut at half-past ten at night. Then, in addition to those acts, it has been proved that, on Saturday nights, the dwellers in this camp, or some of them, on their return from the public-house, habitually make a noise, of such a kind as to disturb those by whose houses they pass on their way back to the camp.

It has also been proved that some of the dwellers in this encampment, instead of using the ordinary way provided by the defendant for entering it, approach it over other people's property, damaging the neighbours' fences in the process. In addition, some of the dwellers in this encampment have horses which they do not tether properly, and the horses break loose, with the result that damage is caused to the fruit trees and property of the neighbours.

The plaintiffs have, however, failed to prove that anything done on the defendant's land gives rise to a complaint by the neighbours. I do not think there is any smell of which reasonable people can complain coming from the camp. I do not think there is any fouling of the defendant's land which gives rise to any real danger to health. I think that the occupants of the camp are themselves sufficiently alive to the danger which they themselves would run if they fouled the ground in the immediate vicinity of their own caravans, and that, therefore, they do not do so. All the acts which do interfere with the comfort and convenience of the neighbourhood, and which threaten the health of the neighbourhood, are acts done not on the defendant's land, but off it, by people whom the defendant brings on to it for his profit.

It is on these facts that the question arises whether the defendant can be held responsible for the nuisance which is caused to the neighbourhood by persons licensed by him to dwell in caravans on his land. It is necessary to settle the principle of law upon which his liability is to be based.

It is of course not unlawful for a person to grant licences to caravan dwellers to place their caravans on his land. But it seems to me that, in bringing on to his land, for his own profit, a number of people who dwell in caravans, the defendant has put his land to an abnormal use. Persons whose homes are in caravans moving about from place to place have habits of life many of which are offensive to those who have fixed homes, and when collected together in large numbers, on a comparatively small parcel of land, such persons would be expected by reasonable people to do the kind of things which have been complained of in this action and of which proof has been given.

On that view of the matter the principle which underlies the decision in *Rylands* v. *Fletcher* (1) affords in my judgment a basis upon which the defendant can be made responsible in law for the nuisance which undoubtedly exists, on the facts, in the vicinity of this camp, and which nuisance is caused by some of the people whom he brings there for his own profit. On that principle I hold that the defendant is responsible and that an injunction must be granted against him.

I desire to say this: that I am satisfied that some of the occupants of caravans on this brickfield are quite respectable people who have the misfortune to be compelled by modern economic conditions to live in caravans rather than in houses, and against them not one word can properly be said. They, I feel quite certain, would make use, and would prefer to make use and do make use, of the sanitary facilities which the defendant has provided for them; but in addition to that class of persons the defendant does attract to his ground a large number of persons whose methods and habits of life are unfortunately not in accordance with the standard to which the great majority of people in this country conform.

As regards the terms of the injunction, that will be framed so as to restrain the defendant from allowing the occupants of the camp to do certain specific acts—namely, foul the neighbours' land, break through the neighbours' fences, permit their horses to damage the neighbours' crops, and disturb the neighbours by noisy behaviour while returning home at night. Then if any of those things happen, quite regardless of any steps which he has taken to stop them, the defendant will be responsible. In order, however, to give him time to make arrangements for the purpose of complying with the terms of the injunction, I think it will be reasonable to suspend its operation for six weeks.

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(1) L. R. 3 H. L. 330 applied.

The order, as drawn up, was as follows :—

This Court doth declare that it is the duty of the defendant to prevent all persons licensed by him to occupy use or dwell in caravans tents or huts placed or erected upon his land known as the Old Brickfields St. Paul's Cray in the County of Kent in the pleadings mentioned (*a*) from depositing solid or liquid filth upon any land in the vicinity of his said land (*b*) from breaking down the fences of persons dwelling in the vicinity of his said land or from otherwise trespassing upon the lands of any such persons (*c*) from permitting horses to trespass upon land in the vicinity of his said land and (*d*) from creating disturbance by noise in the vicinity of his said land in such a way as by all or any of the acts aforesaid to be a nuisance or injurious to the health of the neighbourhood. And this Court doth order that the defendant be restrained from allowing any person licensed by him to occupy use or dwell in any caravan tent or hut placed or erected on his said land (*a*) to deposit any solid or liquid filth upon any land in the vicinity of his said land (*b*) to break down the fences of persons dwelling in the vicinity of the said land or otherwise to trespass upon the lands of any such persons (*c*) to permit horses to trespass upon the land in the vicinity of his said land and (*d*) to create disturbances by noise in the vicinity of his said land in such a way as by all or any of the acts aforesaid to be a nuisance or injurious to the health of the neighbourhood. But the operation of this injunction is suspended until after 9th September, 1932. And it is ordered that the defendant do pay to the plaintiffs the relators the Bromley Rural District Council their costs of this action such costs to be taxed by the Taxing Master.

Solicitors: *May, Sykes & Co.*; *Farrar, Porter & Co., for Chancellor & Ridley, Dartford.*

J. L. D.

In re GROSVENOR SETTLED ESTATES.

DUKE OF WESTMINSTER *v.* McKENNA.

[1932. W. 2402.]

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Oct. 19, 25.

Settled Land—Tenant for Life—Leasing Powers—Building Lease for 999 *Years—Grant in Consideration of Surrender of existing Lease and Payment of Premium—Covenant by Lessee to rebuild when necessary—No Time Limit prescribed for rebuilding—Validity—Settled Land Act,* 1925 (15 *Geo.* 5, *c.* 18), *ss.* 41, 42, 44, 117, *sub-s.* 1 (*i.*).

A tenant for life has power under s. 41 of the Settled Land Act, 1925, to grant a building lease for a term of 999 years containing a covenant by the lessee to rebuild existing premises when it shall become necessary, and in particular when required by the lessor's estate surveyor so to do, but without prescribing any definite time within which such rebuilding shall be carried out or begun.

ORIGINATING SUMMONS.

Under a settlement dated February 15, 1901, and made between the plaintiff Hugh Richard Arthur Duke of Westminster of the first part, Constance Edwina Cornwallis West of the second part, the Hon. Walter Warwick Vivian and others of the third part, and Anthony Earl of Shaftesbury and another of the fourth part, the Grosvenor Estates were settled upon certain uses—namely, to the Duke of Westminster during his life, with remainder to his eldest and other sons in tail male, with remainder to the defendant Captain Robert Arthur Grosvenor during his life with remainder to the said defendant's son Hugh Frederick Grosvenor (an infant) in tail male. There was a power reserved to the Duke of Westminster, in case there should be no son of his who should attain the age of twenty-one years or die under that age leaving issue inheritable, to revoke the subsequent uses of the settlement and to appoint the estates to such uses as he should think fit. The Duke, who had no sons, had exercised this power by appointing to himself absolutely, so that the interests of the tenant for life and tenant in tail in remainder were now dependent on the Duke having a son who should succeed him as tenant in tail but should not disentail the estates.

The Grosvenor Estate comprised a large block of property in London south of Oxford Street and east of Park Lane. The summons asked the Court to determine whether the plaintiff as tenant for life had power under the Settled Land Act, 1925, to grant a valid and effective lease of a house subject to the trusts of the settlement—namely, No. 8 Carlos Place, Grosvenor Square, in the form of a draft exhibited to an affidavit made by Mr. A. C. H. Borrer, a member of the firm of solicitors advising the plaintiff, upon having a surrender of the existing lease, of which there were about fifty-seven years unexpired. The draft contained a covenant by the lessees to keep the demised buildings in a proper state of structural and decorative repair, and continued: "and will as and when reasonably necessary and particularly when reasonably required by the estate surveyor so to do rebuild in a proper and workmanlike manner and to the reasonable approval in all respects of the said estate surveyor the whole or such part of the demised buildings as may require to be rebuilt, and so that in the event of a total rebuilding being required the new building shall be in every way appropriate to the circumstances existing at the time of such rebuilding." The draft lease did not prescribe any time within which the rebuilding of the premises was to be carried out or commenced. The existing building was erected in 1891, and there was evidence by a surveyor that it might require rebuilding within the next 150 years on account of changing conditions, though if duly repaired it should last as a structure for at least that period.

Gavin Simonds K.C. and *F. Baden Fuller* for the plaintiff. The question is, shortly, whether a tenant for life can grant a building lease for 999 years under the Settled Land Act, 1925, when the lease itself does not prescribe that the building or rebuilding is to be carried out within any definite time. The proposed lease is to be granted in consideration of a covenant to rebuild, and is therefore a building lease. The existing house No. 8 Carlos Place is bound to require rebuilding at some future date, and possibly more than once during the term, but it may not be necessary for many years to come. It is desired to obtain a decision in this case which will govern similar transactions on the estate in future, and thus avoid unnecessary expense.

The plaintiff has been advised that in cases where it is desirable to add to the capital moneys of the settled estate, it is preferable to grant a 999 year lease in consideration of a premium rather than to sell the freehold. A lessor is in a much stronger position than a vendor of the freehold in enforcing covenants as to user calculated to preserve the amenities of the estate.

The Settled Land Act, 1925, s. 41, authorizes a tenant for life to lease settled land in the case of a building lease for a term not exceeding 999 years. By s. 42 every lease is to reserve the best rent that can be obtained, having regard to any fine taken, and by s. 44 every building lease is to be made partly in consideration of the lessee, or some other person, having erected or having agreed to erect buildings, new or additional, or having improved or repaired or agreed to improve or repair buildings on the settled land.

The Act does not prescribe any definite time within which the building is to be erected. Under the similar power given to mortgagors and mortgagees in possession by s. 99 of the Law of Property Act, 1925, every building lease is to be made in consideration of the lessee or some other person having erected, or agreeing to erect within not more than five years from the date of the lease, buildings new or additional, etc. The same distinction between the powers of tenants for life and mortgagors and mortgagees respectively is found in the Conveyancing Act, 1881, and the Settled Land Act, 1882. See Wolstenholme and Cherry's Conveyancing Statutes, vol. i., pp. 295, 297. The definition of "building purposes" in s. 117, sub-s. 1 (i.), of the Settled Land Act, 1925, does not carry the matter any further. It is submitted that the proposed lease will be granted for a "building purpose," though the obligation to rebuild will only arise at some future date. The advisers of all parties interested in the settled estate concur in supporting this policy. The covenant to be entered into by the lessees is entirely different from that in an ordinary repairing lease. The plaintiff is advised that the rent fixed is the best rent obtainable, having regard to the premium payable, but that does not affect the construction of the Act.

C. J. Radcliffe for the trustees of the settlement. The trustees do not desire to oppose the grant of the proposed lease in any way, but it is my duty to make observations on any possible legal difficulties that may arise. The proposed lease is on the border-line between an occupation lease and a building lease. Unless one knows what is going to be spent on rebuilding, and when it is going to be spent, it is impossible to calculate what is the value of the benefit secured to the settled estate, and therefore whether the rent reserved is or is not the best rent obtainable. Sect. 44, sub-s. 2, giving liberty to reserve a peppercorn or nominal rent for the first five years of the term, assumes that the building that is to be done will prima facie be done at the time of the granting of the lease or in the immediate future and that no building or rebuilding will be required after the first five years.

M. G. Hewins for Captain Robert Arthur Grosvenor, tenant for life in remainder, and *Walter Hart* for the infant tenant in tail in remainder, supported the application, the latter referring to *Hillyard* v. *McDonald* (1), containing a definition of a "building lease reserving rent" within Sch. I., Part II., of the General Order made in pursuance of the Solicitors' Remuneration Act, 1881, and to *In re Grosvenor Settled Estates* (2), where Maugham J. said that the legislation of 1925 was of a remedial character and must be construed in a beneficent way.

Gavin Simonds K.C. replied.

Cur. adv. vult.

Oct. 25. EVE J. By this summons the tenant for life of the Grosvenor Estates settled by a deed of February 15, 1901, submits for the determination of the Court the question whether he has power to grant a valid and effective lease of

(1) [1917] 2 K. B. 248. (2) [1932] 1 Ch. 232.

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a house and premises forming part of the settled estate for a term of 999 years in the form of a draft which has been prepared and is put in evidence. The respondents to the summons are the trustees and the persons in esse interested in the settled estate. The point involved is whether the proposed lease is a building lease within the meaning of s. 41 of the Settled Land Act, 1925. By that section a tenant for life may lease the settled land or any part thereof for any purpose whatever for any term not exceeding in the case of a building lease 999 years; by s. 117, sub-s. 1, a building lease is a lease for any building purposes or purposes connected therewith, and building purposes include the erecting and improving of and the adding to and the repairing of buildings. By s. 44, sub-s. 1, it is enacted that every building lease shall be made partly in consideration of the lessee or some person by whose direction the lease is granted, or some other person having erected or agreeing to erect buildings new or additional, or having improved or repaired or agreeing to improve or repair buildings, or having executed or agreeing to execute on the land leased an improvement authorized by the Act for or in connection with building purposes.

The proposed lease is expressed to be granted in consideration (inter alia) of "the cost which the lessee will be at in rebuilding," and in addition to the ordinary covenants to repair and at all times during the term to keep the demised buildings (both inside and outside) in a proper state of structural and decorative repair, the lessee covenants that he will as and when reasonably necessary (and particularly when reasonably required by the landlord's estate surveyor so to do) rebuild in a proper and workmanlike manner and to the reasonable approval in all respects of the said surveyor the whole or such part of the demised buildings as may require to be rebuilt, and so that in the event of a total rebuilding being required, the new building shall be in every way appropriate to the circumstances existing at the time of such rebuilding.

It is not suggested that the proposed lease does not conform to the statutory provisions regulating leases generally, and the evidence filed in favour of creating long terms rather than effecting sales is not challenged; but it is conceded that the covenant I have just read may not become effective for a century or more, and in these circumstances a doubt has been raised whether such a lease is a building lease within the Act, in that it fixes no limit of time from the date it bears within which the buildings are to be erected or even commenced. It is true that under s. 44, sub-s. 2, a peppercorn rent or a nominal or other rent less than the rent ultimately payable may be made payable for the first five years or any less part of the term, but for reasons I am about to state I do not think I ought to construe that sub-section as sufficient to raise the implication that a corresponding period of five years for the execution of the works ought to be read into the lease in the absence from the Act of any other indication to that effect. In my opinion the omission of the limit was deliberate, and therefore its absence from a lease granted pursuant to the Act and in conformity with the regulations respecting a building lease does not in my opinion invalidate such lease. This conclusion is based on the language of the Act itself, and is in my opinion supported by the following considerations. By the Conveyancing Act of 1881 and the Settled Land Act of 1882 powers were conferred upon mortgagors and mortgagees and upon tenants for life respectively to lease the mortgaged or settled land for any term not exceeding in the case of a building lease a term of ninety-nine years. Under the former Act but not under the latter the lease was to be made in consideration of the lessee having erected or agreeing to erect " within not more than five years from the date of the lease " buildings, etc. When by the legislation of 1925 the maximum term for a building lease was enlarged both in respect of mortgaged and settled property to 999 years, the same distinction was maintained. In the case of mortgaged property the lease has still to be granted in consideration of the lessee having erected or agreeing to erect " within not more than five years from the date of the lease." As I have already pointed out, there is no such limit in the Settled Land Act, 1925. In

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each of the four Acts the definition of a building lease is practically the same, and each contains in the same language statutory authority to accept a nominal or reduced rent for the first five years or any less part of the term.

The conclusion is, I think, inevitable that the Legislature did not intend to impose on a tenant for life the obligation of obtaining from his lessee under a building lease a covenant to commence building operations within any specified time. There will be a declaration that the plaintiff has power to grant the proposed lease.

Solicitors: *Boodle, Hatfield & Co.*

H. L. L.

MAUGHAM J.
1932
June 21, 22.

In re DE CARTERET.

FORSTER *v.* DE CARTERET.

[1932. D. 593.]

Charity—Will—Trust for "providing annual allowances of forty pounds each to widows or spinsters in England whose income otherwise shall not be less than eighty or more than one hundred and twenty pounds per annum"—Preference to be given to "widows with young children dependent on them"—Valid Charitable Trust—Statute of Elizabeth, 1601 (43 *Eliz. c.* 4).

A testator bequeathed a sum of money to trustees upon trust to invest it and to use the income of the investments "in providing annual allowances of forty pounds each to widows or spinsters in England whose income otherwise shall not be less than eighty or more than one hundred and twenty pounds per annum. . . . ." The provision continued: ". . . . preference shall be given to widows with young children dependent on them. . . . ."

Held, that the provision was in substance for widows of small means with young children dependent on them and created a valid charitable trust.

In re Gardom [1914] 1 Ch. 662 and *In re Clarke* [1923] 2 Ch. 407 followed.

Pease v. *Pattinson* (1886) 32 Ch. D. 154 and *In re Lacy* [1899] 2 Ch. 149 considered.

ADJOURNED SUMMONS.

By clause 5 of his will dated June 5, 1931, the Right Reverend Frederick George Cecil de Carteret, formerly Bishop of Jamaica (hereinafter called "the testator"), provided: "I bequeath the sum of seven thousand pounds free of duty to Percy Forster and Henry Arthur Stevens upon trust to invest the same . . . . and to use the income thereof in providing annual allowances of forty pounds each to widows or spinsters in England whose income otherwise shall not be less than eighty or more than one hundred and twenty pounds per annum . . . . preference shall be given to widows with young children dependent on them and in all cases the allowances shall be renewable each year at the discretion of the trustees with due regard to any altered circumstances of the beneficiaries." By clause 7 the testator devised and bequeathed his residue as to three equal fourth parts respectively to a niece, one of his executors, and a cousin absolutely, and as to the remaining equal fourth part to that executor to be held by him upon the trusts in the clause mentioned. The testator died on January 3, 1932, and by this summons, issued on March 21, 1932, the executors of the will asked (inter alia) whether the trusts declared by clause 5 of the will were good and valid charitable trusts or were void for perpetuity or otherwise.

Hon. Denys B. Buckley for the trustees.

Ronald F. Roxburgh for the residuary legatees. This disposition does not create a good charitable trust, because the trustees can, without committing a breach of trust, apply some of the fund in a non-charitable manner. In the case of institutions where a means test is imposed on the recipients of benefit, it has been held that the fact that the institutions do not cater for the poorest of the poor is not a reason for holding gifts to the institutions to be non-charitable. There are cases where gifts for the benefit of widows and orphans have been held to be for the benefit of poor widows and children. But in that class of cases there has never been any means test, and therefore that class of cases does not apply to the present case. The objects which the will in the present case seeks to benefit are not necessarily charitable. There is nothing in the personality of the trustees to indicate a charitable intention, and the persons to receive benefits are not described as "deserving" or "needy" or by any of the other words which have been relied upon when there is no means test. The test whether the disposition does or does not create a good charitable trust lies in the answer to the question whether, if the trustees were proposing to apply the income of the fund to non-charitable objects, the Attorney-General could successfully apply to restrain them from doing so. In *In re Estlin* (1) it was held that a woman who had to pay 10*s*. a week to the "home of rest" in which she stayed was not "poor." People with an income of 80*l*. a year are not "poor persons": see *Trustees of the Mary Clark Home* v. *Anderson* (2) and *In re Clarke.* (3) There is another class of cases, summarized in *In re Dudgeon* (4), in which words indicating distress of some kind, and nothing else, have been held to show that the intention was to benefit poor and deserving people. That line of cases, however, cannot have any application to the present case, because in the present case the eleemosynary test is precisely defined. The Court has no power to make inferences in regard to a matter about which the testator has been precise. Therefore it is not open to the Court to say, in the present case, what persons are meant within the limits of 80*l*. to 120*l*. The gift is for "widows or spinsters." In practice it is a gift for widows who have at least 80*l*. a year. The object of the gift is presumably to give financial assistance to widows who are presumed to require it because they have young children dependent on them. A gift to "widows with young children dependent on them" is not a good charitable gift. It would be a good charitable gift if it contained the word "poor" before "widows."

Stafford Crossman for the Attorney-General. This trust is a good charitable trust, because the provision states that the allowances are to be given to widows or spinsters in England, that preference is to be given to widows with young

(1) (1903) 89 L. T. 88.
(2) [1904] 2 K. B. 645.
(3) [1923] 2 Ch. 407, see the headnote.
(4) (1896) 74 L. T. 613.

children dependent on them, and that the allowances are to be renewable each year at the discretion of the trustees, with due regard to any altered circumstances of the beneficiaries. In *Morice* v. *The Bishop of Durham* (1) Sir William Grant M.R., in his judgment, said: "Do purposes of liberality and benevolence mean the same as objects of charity? That word in its widest sense denotes all the good affections, men ought to bear towards each other; in its most restricted and common sense, relief of the poor. In neither of these senses is it employed in this Court. Here its signification is derived chiefly from the Statute of *Elizabeth*. Those purposes are considered charitable, which that Statute enumerates, or which by analogies are deemed within its spirit and intendment; and to some such purpose every bequest to charity generally shall be applied." The preamble of the Statute of Elizabeth (43 Eliz. c. 4) gives the first of the objects under the statute as the "relief of aged, impotent and poor people." Therefore, if the trust in the present case is a trust for the relief of poor people, it comes within the statute. It is either a direct trust for the relief of poor people or a trust coming within the spirit and intention of the statute. In *In re Dudgeon* (2) Stirling J. showed how the expression "poor people" is to be interpreted. He said: ". . . . it appears to me that the cases cited on behalf of the charity do show this, that it is not absolutely necessary to find poverty expressed in so many words, but that the court will look at the whole gift, and, if it comes to the conclusion that the relief of poverty was meant, will give effect to it, although the word 'poverty' is not to be found in it." That is an accurate statement of the law, and if an intention to relieve poverty can be found in a trust, the Court will give effect to that trust, although it does not contain the word "poor." In *In re Clarke* (3) Romer J., as he then was, held that "'poverty' is a relative term, and the expression 'poor people,' for the purposes of a legal charity, is not necessarily confined to the destitute poor, but may extend to comprise persons of moderate means."

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(1) (1804) 9 Ves. 399, 405.

(2) 74 L. T. 613.

(3) [1923] 2 Ch. 407, see the headnote.

The result of those cases is that a gift for the relief of persons of moderate means may be a gift for "the relief of . . . . poor people" within the meaning of the Statute of Elizabeth. If that is so, the question for the Court to determine in the present case is whether the "widows" referred to in the testator's will are persons whose means are so moderate as to make them possible objects of the charity. In *Trustees of the Mary Clark Home* v. *Anderson* (1), ladies possessed of fixed yearly incomes of any amount from 25*l.* to 55*l.* were held to be "poor persons." *Spiller* v. *Maude* (2) shows that the possession of 50*l.* a year in 1815 was not to be regarded as rendering the possessor not a "poor person" within the meaning of the Statute of Elizabeth. The Court is entitled to take judicial notice of that fact. *In re Lacy* (3) was a decision that the possessor of an income of 250*l.* might be a "poor person" within the meaning of the statute. In the present case the Court has to consider whether the testator intended to relieve "poverty" in the sense in which the word must be construed having regard to the authorities. The beneficiaries in the present case are to be women who have not husbands and who have not enough money to be comfortable without help. The provision that the trustees are every year to consider the circumstances of the beneficiaries indicates what was in the testator's mind. There is enough in this case to indicate that the testator intended the trust to be for "the relief of . . . . poor persons" within the Statute of Elizabeth, and the Court can give a benevolent construction to the will and declare that the trust is a valid charitable trust.

MAUGHAM J. [after stating the facts:] The question that arises is whether that is or is not a charitable disposition. The following observations are, I think, beyond dispute. First, the persons to benefit under the trust are persons who are widows or spinsters and therefore have not a husband or, it may be said, in all probability, a man to assist in supporting them; secondly, they are to be a somewhat special class—namely, a class with an income of not less

(1) [1904] 2 K. B. 645.
(2) (1886) 32 Ch. D. 158*n*.
(3) [1899] 2 Ch. 149.

MAUGHAM J.

1932

DE CARTERET, *In re.*
FORSTER *v.* DE CARTERET.

than 80*l.* or more than 120*l.* per annum; thirdly, as was admitted by counsel for the residuary legatees in his able argument, there is a preference to be given to widows with young children dependent on them; and, as there must be many widows with young children dependent on them in this country who satisfy the condition, and the preference is compulsory, I must treat the bequest as if, in substance, it was given for widows with young children dependent on them who otherwise comply with the conditions; and finally, the testator has told the trustees that each year they are to reconsider the matter of the allowances, with due regard to the then circumstances of the beneficiaries. The difficulty in the case arises from the fact that the beneficiaries are not to be absolutely poor; they must have not less than 80*l.* per annum and not more than 120*l.* per annum; and it is said, not without force, that people with incomes within those amounts are not within the phrase "poor people" as found in the first part of the enumeration of charitable objects which is contained in the preamble to the Statute of Elizabeth.

In considering whether this is a good charity I am not in a position to treat the matter de novo, because the whole question is, I think, a matter of case law at the present time. It would be difficult if not impossible to suggest any new principle of interpretation as applicable to the question before me. I am, I think, justified, according to existing authorities, in saying that objects analogous to those mentioned in the statute are in certain circumstances admitted to be charities, and the precise words contained in the preamble to the statute are not final in coming to a conclusion as to whether a particular trust is charitable in the legal sense. In the present case the charity is sought to be supported on the ground that it is a charity for the relief of poverty in a wide sense, and I propose to consider it from that point of view. The decisions show beyond question that "poverty" does not mean destitution.

The first case to which I think I may usefully refer is *Spiller* v. *Maude* (1), a case decided by Sir George Jessel M.R.

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(1) 32 Ch. D. 158*n*.

in 1881. Sir George Jessel was there dealing with a society called the York Theatrical Fund Society, and the report shows that the rules and regulations provided, amongst other things, for the granting of annuities to contributors to the fund "on becoming incapacitated either by age, accident, or other infirmity, from exercising the duties of his or her profession as an actor or actress and not possessing an independent income of more than 50*l.* per annum." Sir George Jessel, having gone through the rules of the society, came to the conclusion that the whole fund was a charity, and he thought that poverty was clearly an ingredient in the qualification of members who were to receive the benefits of the society.

Accordingly I may take that decision as showing that from the year 1881 a person possessing an income of 50*l.* per annum was treated by the Court as a proper object of charity in the legal sense and that a fund for that purpose might well be a trust providing for the relief of poverty. Questions relating to the Royal General Theatrical Fund Association, which I may observe was incorporated by Royal Charter as long ago as 1853, came before Stirling J. in *In re Lacy.* (1) In the report of that case there is a statement of the rules of the Association: and it is to be remarked that rule 15 provided for certain annuities for life, and rule 18 provided that "no member of class A who shall be in receipt of 120*l.* per annum, of the class B who shall be in receipt of 200*l.* per annum, or of the class C who shall be in the receipt of 250*l.* per annum derivable from whatever property or source, independent of his or her claim on the fund of this association, shall be entitled to an annuity out of such fund"; and there was a somewhat similar provision in rule 19. Counsel for the plaintiff argued that the Association was not charitable, but Stirling J., who reserved judgment, began his judgment in these terms (2): "The first point is whether the Royal General Theatrical Fund Association is or is not a charity. This turns on the terms of the charter dated January 29, 1853, and the rules therein referred to, particularly rules 15, 18 and 19. It was considered in *Spiller*

(1) [1899] 2 Ch. 149, 153. (2) [1899] 2 Ch. 156.

v. *Maude* (1) by Sir George Jessel M.R., who held that the association was a charity, and with that opinion I respectfully agree." Stirling J. then added: "I do not consider that *Spiller* v. *Maude* (1) was overruled or intended to be overruled by *Cunnack* v. *Edwards*." (2) That is therefore a clear expression of opinion by Stirling J. that the Royal General Theatrical Fund Association is a good charity, that is to say, a charity for the relief of poverty or a closely analogous object.

Those are also reported cases as to institutions, and I refer to them for the purpose of showing that an institution whose objects are, amongst other things, to benefit persons whose income may be as much as 250*l.* a year are yet to be considered in proper cases to be charitable institutions. I do not think that, as a general rule, a person must or may be considered to be a poor person if his income is, e.g., 200*l.* a year: but those cases go to show that the institutions may be charitable although a person to be benefited has an income of that size. Accordingly, there may be a good charity in the sense of a charity for the relief of poverty, although persons to be benefited are by no means destitute.

There have been some far more recent decisions, which seem to me to tend in the same direction. In the case of *In re Gardom* (3) my brother Eve had to deal with a gift which was to be applied "for the maintenance of a temporary house of residence for ladies of limited means." There were other points, to which I need not refer, as they are irrelevant to the present purpose. The learned judge said (4): "Prima facie, the institution referred to by the testatrix would appear to be of a charitable nature. It is not contemplated that it will be self-supporting, and the obvious intention of the testatrix is that her money is to be used for the purpose of providing a temporary home for ladies whose means are too restricted to permit of their providing or enjoying unassisted the advantages of such a home. The validity of the bequest as a good charitable trust is challenged upon two grounds, the one that the object is not in fact charity, and the other that, even if it be so, the subsequent bequests in the will, the one in the nature of an alternative bequest, if the house is considered unnecessary, and the other the bequest of the residue, introduce alternative objects which may or may not be charitable, and that the whole disposition is thereby rendered void for uncertainty. I do not think either of these contentions has been established. It is true that ladies of limited means are not destitute, and that the expression 'limited means' may vary in its signification according to the standard by which the means are measured, but these arguments provoke the rejoinder that there are degrees of poverty less acute than abject poverty or destitution, but poverty nevertheless, and further that in this case the limitation of means contemplated is presumably a limitation such as will necessitate some contribution from the bounty of the testatrix before the recipient would be able to defray the expense of a temporary sojourn in the home. In other words, the objects to be benefited by the bequest are ladies too poor to provide themselves with a temporary home without outside assistance. I think it is a good charitable trust and am fortified in this view by some observations of Channell J. in . . . . *Trustees of the Mary Clark Home* v. *Anderson*. (1) He says: 'I do not know any standard of poverty, nor how I can lay down any rule; the only thing to guide me is this: these ladies go to the institution for the sole reason that they are poor, and the institution is absolutely charitable.'" Then Eve J. continued: "I think those words apply exactly to the section of the public and to the institution which the testatrix here intended to benefit and to subsidize." I accept the statement of the learned judge there as a correct view of poverty as a phrase implied in the first words of the preamble to the Statute of Elizabeth: and I think the learned judge was properly, if I may say so, expressing the opinion that in the Statute of Elizabeth the expression "poor people" is not necessarily confined to the destitute poor, and that it would include persons who, having regard to the circumstances in which they are placed, and perhaps to the class from which they have come, may properly be regarded as persons within the language or spirit of that preamble.

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(1) 32 Ch. D. 158*n.*

(2) [1896] 2 Ch. 679.

(3) [1914] 1 Ch. 662.

(4) Ibid. 667.

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(1) [1904] 2 K. B. 645, 656.

That view, I think, is also expressed by the present Romer L.J. in *In re Clarke.* (1) There were a number of points discussed in that case: but the only point that is material to the present purpose was this. The testator had given a portion of his residue "to (*a*) such institution society or nursing home or nursing homes or similar institutions as assist or provide for persons of moderate means such as clerks governesses and others who may not be able or eligible to benefit under the National Health Insurance Act Old Age Pensions or other Act of a like character to have either surgical operations performed together with medical treatment or medical treatment alone on payment of some moderate contribution. . . . ." There was a society which claimed that it carried out those purposes—namely, the Lister Institute of Preventive Medicine: and on their behalf it was contended that the gift was a good charitable gift. The contrary was contended, and there was an elaborate argument on both sides. Romer J., as he then was, in the course of a reserved judgment, said (2): "It was contended on behalf of the next of kin that the objects designated under heading (*a*)"—that is the heading that I have already stated—"are not charitable, because the persons to be benefited by the institution, society or nursing homes are not poor persons but persons of moderate means, and because such persons can only benefit on payment by themselves of some moderate contribution. But in *Trustees of the Mary Clark Home* v. *Anderson* (3), a home for ladies in reduced circumstances, of which the inmates were to be ladies of fifty years old or upwards possessed or in the actual enjoyment of a fixed yearly income of not less than 25*l.* and not more than 55*l.*, was held to be exempt from landlord's property tax and inhabited house duty as being a 'house provided for the

(1) [1923] 2 Ch. 407.
(2) [1923] 2 Ch. 407, 411, 413.
(3) [1904] 2 K. B. 645.

reception or relief of poor persons.' Channell J. in the course of his judgment, after referring to the case of *Attorney-General* v. *Wilkinson* (1), said (2): 'that seems to lead to the conclusion that the expression "poor person" in a trust for the benefit of poor persons does not mean the very poorest, the absolutely destitute; the word "poor" is more or less relative.'" Then, after citing another passage, to which I have already referred, in the judgment of Channell J., and after referring to the decision of Eve J. in *In re Gardom* (3) and citing the passage on which I have relied, the learned judge continues as follows: "In the present case I think that the words of Channell J. and the words of Eve J. which I have quoted apply exactly to the section of the public and to the institutions which the testator intended to benefit and to subsidize. The 'moderate means' to which he refers are presumably means so moderate as to necessitate some contribution from the bounty of the testator before the recipient would be able to procure the surgical operation or medical treatment of which the recipient might stand in need. In *In re Estlin* (4) it was moreover held by Kekewich J. that a bequest for the purpose of establishing a home of rest for lady teachers was none the less charitable because each lady was required to contribute 10*s*. a week for board and lodging. I therefore hold that the objects under heading (*a*) are charitable objects."

It is true that the gifts in the cases to which I have referred are gifts to institutions or for the establishment of institutions. When the question, however, is as to the ambit of the preamble to the Statute of Elizabeth, and particularly with regard to the limits that must be placed on charities for the relief of poverty, I am of opinion that I may safely regard those cases as establishing the correctness of the passages which I have read from *In re Gardom* (5), and may properly hold that in the case of a gift to trustees for the purpose of relieving persons of limited means—in the present case, persons whose means are between 80*l.* and 120*l.* per annum—whose circumstances are such that it is very reasonable that some contribution from the bounty of the testator should be made to them to enable them to carry out their duties as citizens, such an object is a good charitable object, and may properly be supported by the Court without any departure from the principles on which the Court is accustomed to act.

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(1) (1839) 1 Beav. 370.
(2) [1904] 2 K. B. 645, 655.
(3) [1914] 1 Ch. 662, 667.
(4) 89 L. T. 88.
(5) [1914] 1 Ch. 662.

In the present case, as I have pointed out, the gift is, in effect, for widows with young children dependent on them. I should have hesitated to hold that it was a good charitable gift had it been merely for "widows and spinsters": but I think that, in confining it, as I do, in effect, to widows with young children dependent on them, I am within the decisions to which I have referred.

Solicitors: *Gray & Dodsworth; Treasury Solicitor.*

K. R. A. H.

In re CHAPLIN.

NEAME *v.* ATTORNEY-GENERAL.

[1932. C. 494.]

MAUGHAM J.

1932
July 6.

Charity—Will—Trust for Home of Rest—Further Wishes of Testator in regard to Home not to be binding if impracticable—Wish that Financial Position of Candidates for Admission should not be considered—Charitable Trust.

A testator devised and bequeathed to his trustees a freehold house, its contents, and funds representing the net residue of his estate upon trust to establish and found a charity "to provide a Home of Rest that shall afford the means of physical and/or mental recuperation to persons in need of rest by reason of the stress and strain caused or partly caused by the conditions in which they ordinarily live and/or work." The same clause provided that the trustees should apply to the Court or the Charity Commissioners for a scheme in respect of the charity and also specified the testator's further wishes with regard to the charity, but provided that if the Court, the Charity Commissioners, or the trustees considered those wishes in any respects impracticable or difficult to realize, in those respects they were not to be regarded as binding on or fettering the discretion of the Court, the Charity Commissioners, or the trustees in the provision or alteration of a scheme. One of those wishes, expressed also in the same clause, was that in considering the suitability of a candidate for admission to the home the candidate's financial position should not be taken into account; another was that persons admitted might be required to pay according to their means for board, lodging and other benefits and, where reasonably possible, for medical attendance and treatment, for which, however, the funds of the home might be drawn upon at the trustees' discretion:—

Held, that these were valid charitable trusts.

In re James [1932] 2 Ch. 25 followed.

ADJOURNED SUMMONS.

By his will dated June 6, 1930, Alexander Chaplin (hereinafter called " the testator ") declared that his trustees should stand possessed of funds representing the net residue of his estate (hereinafter called "the trust funds") and of a certain freehold house and its contents " on trust for the purposes of and to establish and found out and by means of the same a charity having the following objects, namely : to provide a Home of Rest that shall afford a means of physical and/or mental recuperation to persons in need of rest by reason of the stress and strain caused or partly caused by the conditions in which they ordinarily live and/or work." That provision was in clause 12 of the will, which continued : " And I declare that my trustees shall . . . . apply to the Chancery Division of the High Court of Justice or to the Charity Commissioners for a scheme in respect of the said charity and the management regulation and administration of the said charity . . . . and I declare that with regard to the said charity the following are my further wishes but that if in any respects they are considered by the Court or by the Charity Commissioners or by my trustees impracticable or difficult to realise then in such respects they are not to be regarded as binding on or fettering the discretion of the Court or of the Charity Commissioners or of my trustees in the provision or alteration of a scheme." Para. (*h*) of the same clause provided : " In considering the suitability of a candidate for admission to the home his or her need and the economic situation of the charity shall but the financial position of the candidate shall not be taken into account " ; and para. (*j*) provided : " Any person admitted to the home may be required to pay for his or her board and lodging and other benefits received by him or her according to his or her means. . . . . Fees for medical attendance and/or treatment to be paid for by the patient where reasonably possible but if thought by the trustees to be necessary or desirable the trust funds may be drawn upon for such fees to a reasonable extent. . . . ." The testator died on August 9, 1930. By this summons, issued on February 2, 1932, the trustees asked (inter alia) whether the trusts of the freehold house and its contents and of the trust funds were valid charitable trusts or were void for perpetuity or otherwise.

Colquhoun Dill for the trustees.

Stafford Crossman for the Attorney-General. The trusts are good charitable trusts. The case is covered by *In re James* (1), to which it bears a remarkable resemblance. In that case Farwell J. held that a trust for establishing a Home of Rest was a charitable trust within the Statute of Elizabeth (43 Eliz. c. 4).

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(1) [1932] 2 Ch. 25.

R. R. Formoy for the next of kin. The trusts in the present case are not similar to those in *In re James.* (1) The purposes of the Home of Rest which was considered in *In re James* (1) were charitable, because it was necessary for the members of the religious community, who were among those intended to benefit by it, to carry on their work and recuperate: see also *In re de Carteret.* (2) In the present case the charity is for persons suffering from strain from the conditions in which they live or work. There is a large undefined class of persons to whom the testator wished to extend philanthropic or benevolent help, but he has made the trusts applicable to persons who are not necessarily aged, impotent, or poor. It is not possible to read into the will any implication bringing the trusts within the Statute of Elizabeth. They are benevolent trusts, but they are not "charitable" within the strict meaning of the word.

MAUGHAM J. [after stating the facts :] Everything that can properly be said on behalf of the next of kin has been said, but it is impossible fairly to distinguish the case from *In re James.* (1) It must, I think, be admitted that in the present case the testator's object is not merely to provide for the relief of poverty, and I think the same was true in *In re James.* (1) Accordingly, the objects, if they are to be held charitable, must be justified on grounds other than the relief of poverty. In *In re James* (1) the trust was for the establishment of a home of rest for the sisters of a community, the clergy of the Diocese of Truro, and such persons as the Mother Superior of the community should nominate and appoint ; and the testatrix bequeathed money, the interest of which was to be applied to repair the house and maintain and support the inmates. Farwell J., following *In re Estlin* (3), said (1) : ". . . . prima facie in my judgment the words 'Home of Rest' themselves indicate something in the nature of a hospital, although not strictly a hospital, that is to say, a home which is to provide relief for those who are in need of it, not by means of medicine or medical attendance, but by providing them with the means and possibility of rest, and that is in my view in a true sense providing for the impotent, and accordingly to provide a Home of Rest is, in my judgment, prima facie a good charitable object."

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(1) [1932] 2 Ch. 25, 31.
(2) Ante, p. 103.
(3) (1903) 72 L. J. (Ch.) 687.

In the case before me I have stronger reasons than had Farwell J. for coming to the same conclusion. In the will with which he had to deal it was only by reasonable implication that it could be shown that the home intended was something in the nature of a hospital. In the present case the object of the home is to "afford the means of physical and/or mental recuperation" to persons whose need is a real need of rest. Following Farwell J., I come to the conclusion that the home contemplated by the testator is a home such as is described in the judgment in *In re James* (1), and I accordingly decide that the trusts are valid charitable trusts.

Solicitors: *Tamplin, Joseph, Ponsonby, Ryde & Flux, for Davenport Jones & Glenister, Hastings and Eastbourne; Treasury Solicitor.*

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(1) [1932] 2 Ch. 25, 31.

K. R. A. H.

. *Re* BIRKETT (*decd.*). [1950]
R. 316.

Followed. *In re* BIRKETT, DECD.
[1950] 1 Ch. 330

Considered. *Re* JEEVES.
[1949] Ch. 49

In re COSSENTINE.

MAUGHAM J.

1932
July 1.

PHILP *v.* TRUSTEES OF THE WESLEYAN METHODIST LOCAL PREACHERS' MUTUAL AID ASSOCIATION.

[1932. C. 889.]

Will—Construction—Gift of Residue "to be divided between the Local Preachers' Mutual Aid Society and the heirs of my brother and sisters"—Testator's Brother Dead and Sisters Alive at Dates of Will and Testator's Death—Meaning of "Between."

A testator by his will bequeathed pecuniary legacies and continued: "The rest of my property of whatsoever kind I give to my wife and after her decease to be divided between the Local Preachers' Mutual Aid Society and the heirs of my brother and sisters." At the date of the will the testator had two sisters living, each of whom had one child, also then living. He had had no sister who had predeceased him. He had no brother then living, but had had one brother who had predeceased him leaving a wife and one child, both alive at the date of the will. The testator's wife predeceased him:—

Held, (1.) that the gift "to the heirs of my brother and sisters" was a gift to the sisters and the daughter of the deceased brother.

In re Dale [1931] 1 Ch. 357 followed.

(2.) that the gift for division between the charity and the three other donees was a gift in equal fourth shares.

In re Harper [1914] 1 Ch. 70 followed.

In re Walbran [1906] 1 Ch. 64 distinguished.

Observations on the meaning of "between."

ADJOURNED SUMMONS.

By his will dated January 16, 1931, John Harris Cossentine (hereinafter called "the testator") appointed his wife and the plaintiffs on this summons to be the executors thereof, and after bequeathing various pecuniary legacies proceeded as follows: "The rest of my property of whatsoever kind I give to my wife and after her decease to be divided between the Local Preachers' Mutual Aid Society and the heirs of my brother and sisters." The testator's wife died on May 18, 1931. The testator died on July 30, 1931. At the date of his will he had two sisters living each of whom had one child also living at that date. He had had no sister who had predeceased him. He had had one brother who was dead at the date of the will, and had left a wife and one child, both

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alive at the date of the will. By this summons the executors asked (inter alia): (1.) whether the will designated the testator's sisters or the heirs of his sisters as taking under the residuary gift, and (2.) whether the expression "heirs" used in the will denoted persons to be ascertained under the Inheritance Act, 1833, or under the Administration of Estates Act, 1925, or denoted children or some other and what class of persons, or whether, in the case of heirs of a living person, "heirs" meant those who would have been that person's heirs had that person died immediately before the testator or at some other and what time. Evidence was before the Court that the charity described in the will as the Local Preachers' Mutual Aid Society was the Wesleyan Methodists Local Preachers' Mutual Aid Association.

G. D. Johnston for the executors.

J. A. Reid for the Wesleyan Methodist Local Preachers' Mutual Aid Association. The charity is entitled to one moiety of the residue. The gift is not a gift in equal fourth parts. The use of the word "between" indicates that the fund is divisible into two parts, of which one goes to the charity and the other to the heirs of the brother and sisters. "The heirs of my brother and sisters" means the heirs of certain specified people, and the class designated is a composite class: *Doe* v. *Joinville.* (1) The meaning of "bequeath" was dealt with in *In re Walbran* (2), which was considered in *In re Harper* (3) and was followed in *In re Prosser* (4), in which the gift was in similar terms. All the cases were discussed by Luxmoore J. in *In re Dale.* (5) In *In re Walbran* (6) Joyce J. said, in his judgment: "In strictness the word 'between'—as its etymology suggests, when it is a case of dividing—implies division into two parts rather than more." The present case is one in which that observation is applicable.

Lindsay Jopling for the testator's sisters and their children. The sisters and their children do not wish to contend as

(1) (1802) 3 East, 172.
(2) [1906] 1 Ch. 64.
(3) [1914] 1 Ch. 70.
(4) [1929] W. N. 85.
(5) [1931] 1 Ch. 357.
(6) [1906] 1 Ch. 64, 66.

between themselves. The word "heirs" as used by the testator means "children." It is not applicable or appropriate to describe the sisters' heirs, because the sisters were alive at the date of the testator's death and it was then possible that they might survive him, as, in the event, they have done. In *Roberts* v. *Edwards* (1) a testator directed a division ". . . . between my two brothers . . . . or their heirs, in proportion to the number of children each may have then living, ..." and Sir John Romilly M.R. said in his judgment: "It is obvious that the testator used the word 'heirs' for children, a thing not very unusual for testators to do. . . . It is obvious that he considered the expression 'heirs' equivalent to 'children,' and that they were convertible terms." In the absence of any indication to the contrary, the proper division in such a case as the present is a division per capita. In *In re Harper* (2) Sargant J., as he then was, referring to the decision in *In re Walbran* (3) said, in his judgment: "I do not myself think that the word 'between' in common parlance and in ordinary use—whatever may be the case as to its etymology or origin—is more applicable to a division in moieties than to a division in other shares, ..." In the present case it would be going too far to say that "between" in common parlance applies to two people. The Oxford Dictionary, vol. i., p. 834, para. v., 19, states that it has been always "extended to more than two." If that statement had been brought to the attention of the Court in *In re Walbran* (4) Joyce J. might not have decided as he did. In *Dowding* v. *Smith* (5) the testator left his residue to his niece Mary Stockdale and the children of John Stockdale (of whom there were four at the date of the testator's death) "to be equally divided." He did not use the word "between"; but Lord Langdale M.R., in his judgment, said: ". . . . it is contended, that Mary Stockdale and the children are to take equally between them." There is no principle of law compelling the Court to adopt, in cases where one beneficiary is a society, a construction different from that which it adopts where all the beneficiaries are individual human beings.

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(1) (1863) 33 Beav. 259, 261.

(2) [1914] 1 Ch. 70, 75.

(3) [1906] 1 Ch. 64, 66.

(4) [1906] 1 Ch. 64.

(5) (1841) 3 Beav. 541, 543.

F. H. L. Errington for the testator's brother's widow. The gift is a gift to the charity, to the heirs (whatever "heirs" may there mean) of the testator's brother, and to the testator's sisters. It would be difficult to define who are the heirs of a living person. The words "the children of A. and B." have been held to mean "the children of A.—and B." In Theobald on Wills, 8th ed., p. 329, para. 8 (*a*), there is the following passage: "It seems that the *primâ facie* grammatical construction of a gift to the children of A. and B. is that B. and the children of A. are entitled." In support of that proposition are cited *In re Featherstone's Trusts* (1); *In re Walbran* (2); and *In re Harper.* (3) The gift in the present case is "to the heirs of my brother and sisters" as separate persons, and "heirs" there means statutory next of kin. A gift to the "heir" in the singular is a gift to a persona designata, but a gift to "the heir or heirs" is a gift in substitution.

G. P. Slade for the testator's brother's child. "Heirs" in the present case means "children," and the division ought to be per capita.

MAUGHAM J. [after stating the facts:] The will has the merit of great brevity, but its true construction is a matter of considerable difficulty. What is the meaning of a gift of personal estate which is "to be divided between the Local Preachers' Mutual Aid Society and the heirs of my brother and sisters"? On those words several ambiguities arise. Is the division to be between the charity on the one hand and the heirs of the brother and sisters on the other, or is it to be between all the beneficiaries per capita? Next, do the words "between . . . . the heirs of my brother and sisters" mean between the heirs of the brother and of the sisters, or between the sisters and the heirs of the brother? A further question may arise, what does the word "heirs" mean when used by a testator in regard to the personal estate of living sisters of the testator ?

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(1) (1882) 22 Ch. D. 111.

(2) [1906] 1 Ch. 64.

(3) [1914] 1 Ch. 70.

All the relevant authorities have been cited. The latest is *In re Dale* (1), in which there was a gift by will of proceeds of sale to be divided "equally between the children of my son A. and my daughter B." In his judgment in that case, Luxmoore J. carefully considered all the preceding cases on the point and stated the effect of them, so that I need not refer to the facts in the various cases or state the reasons for the judgments in them. I agree with the view expressed in that case by Luxmoore J. (2) that ". . . . in the absence of any context or surrounding circumstances, a gift to the children of A. and B. in equal shares, or to be equally divided between the children of A. and B., should be construed as a gift in equal shares to the individual B. and the children of A." That view seems to be borne out by a consideration of the reported cases to which Luxmoore J. refers. I think that, in the present case, dealing with the gift "to the heirs of my brother and sisters," which is, in effect, identical with a gift "to the heirs of my deceased brother and sisters," I ought to hold that it is to be construed as being a gift "to my sisters and the heirs of my brother," and not as being a gift "to the heirs of my brother and the heirs of my sisters." One difficulty is, therefore, resolved, because any possible construction of the words "the heirs of my brother" must lead to the same person being entitled to that share, since the share, whatever it is, must go to the deceased brother's daughter.

The remaining question is, how must the division between the charity, the testator's sisters and the deceased brother's heir be made ? On that point there has been some difference of opinion, apart from slight differences in the language of testators. I think that Joyce J., in *In re Walbran* (3), did take the view that with regard to a gift "to be equally divided between the children of A. and B.," the prima facie meaning implied a division into two parts rather than into a greater number. I agree that he had some ground, which he mentioned, for thinking that that was what the testatrix in that case meant. But for my part I doubt whether that is the true natural popular meaning of a gift of personal estate "to be divided between the children of A. and B." An ordinary man directing a sum to be divided between the children of his sister and, say, his nephew Jack, would in my opinion, be intending a division per capita. The history of the word "between" goes back, as does the history of many words in common use, to remote antiquity. Reference to the Oxford Dictionary, vol. i., p. 834, shows that if you go as far back as Anglo-Saxon times, the word "between" was etymologically a reference to "two." But there is also in the Oxford Dictionary, vol. i., p. 835, para. v., 19, the statement that "in all senses, *between* has been, from its earliest appearance, extended to more than two. In Old English and Middle English it was so extended in sense 1" (i.e., the sense of simple position) "in which *among* is now considered better. It is still the only word available to express the relation of a thing to many surrounding things severally and individually, *among* expressing a relation to them collectively and vaguely . . . ." The illustrations given show that in the opinion of the editor it is not, in strictness, right to direct a sum to be divided "among A., B. and C.," but that the correct phrase is, and for many years has been, "between A., B. and C." Agreeing as I do with that view, I am disposed to follow the decision of Sargant J. (as he then was) in *In re Harper*. (1) In that case there was a gift of a fund "to be divided equally between the unmarried daughters of my brother-in-law Dr. H. and Dr. G. equally." Dr. H. had five daughters, of whom three were unmarried, and Dr. G. one daughter only, who was four years old, and Sargant J. held that the gift was a gift to Dr. G. personally and not to his "unmarried daughter," and that the fund in question was divisible in equal fourth parts. On the whole, I am of opinion that the gift in the present case ". . . . to be divided between the Local Preachers' Mutual Aid Society and the heirs of my brother and sisters" is, according to the natural meaning of the words—which I have construed as meaning a gift to be divided between (for in this case I decline to use the word "among") the charity, the sisters, who were alive at the date of the testator's death, and the daughter of his deceased brother—a gift in equal fourth parts. It is true that it is not a family class, but, for the reasons given by Sargant J. in *In re Harper* (1), and bearing in mind that unless I am right as to the meaning of the word "between" there are no words of division applicable to the testator's sisters and the daughter of his brother, I hold that the testator did intend and has expressed the intention that the property should go, in the events which have happened, in equal fourth shares.

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(1) [1931] 1 Ch. 357.
(2) [1931] 1 Ch. at p. 367.
(3) [1906] 1 Ch. 64.

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(1) [1914] 1 Ch. 70.

Solicitors: *Gregory, Rowcliffe & Co., for Caunter & Venning, Liskeard; Kingsley Wood, Williams & Co.; Bridges, Sawtell & Co., for Henry Edwin Wilkes, Stowmarket; Oldman, Cornwall & Wood Roberts, for Ollard & Ollard, Wisbech.*

(1) [1914] 1 Ch. 70.

K. R. A. H.

Applied. GUNNER *v.* GUNNER AND STIRLING. [1948] 2 All E.R. 771.

Distinguished. LORT-WILLIAMS *v.* LORT-WILLIAMS. [1951] 2 All E.R. 241.

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June 30; *July* 15.

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Nov. 1, 2.

COUSINS *v.* SUN LIFE ASSURANCE SOCIETY.

[1932. C. 605.]

Insurance (Life)—Policy effected by Husband on his Life—Expressed to be for Benefit of named Wife—Death of Wife in Husband's Lifetime—Right to Benefit of Policy—Vested Interest of Wife—Married Women's Property Act, 1882 (45 *&* 46 *Vict. c.* 75), *s.* 11.

A husband effected policies of assurance on his life expressed to be for the benefit of his wife named therein under the provisions of the Married Women's Property Act, 1882:—

Held, by the Court of Appeal (reversing the decision of Eve J.), that the wife took an immediate vested interest in the policy which passed on her death in the husband's lifetime to her personal representatives as part of her estate.

Prescott v. *Prescott* [1906] 1 I. R. 155 approved and followed.

Robb v. *Watson* [1910] 1 I. R. 243 and *In re Collier* [1930] 2 Ch. 37 doubted.

ACTION.

The plaintiff claimed against the defendant Society and the executors of Lilian Cousins, his wife, who died on October 3, 1931, that he was entitled to the sole beneficial interest in two policies of assurance on his own life which he had effected with the defendant Society in 1911 and 1912 respectively, and which were expressed to be for the benefit of his named wife under the provisions of the Married Women's Property Act, 1882. (1)

The facts are fully stated in the judgment of the learned judge. The action being a test case, owing to the existence of a large number of policies current in the same form, was a friendly proceeding, and the defendant Society agreed to pay the costs of all parties thereto.

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(1) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 11: ". . . . A policy of assurance effected by any man on his own life, and expressed to be for the benefit of his wife, or of his children, or of his wife and children, or any of them, or by any woman on her own life, and expressed to be for the benefit of her husband, or of her children, or of her husband and children, or any of them, shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured, or be subject to his or her debts: . . . ."

Gilbert Beyfus for the plaintiff. The point now raised is very similar to that decided by Clauson J. in *In re Collier* (1), the only substantial difference being that in that case the parties were married in 1876 and it therefore came under the Married Women's Property Act, 1870, s. 10, the wording of which is slightly different from that of the Married Women's Property Act, 1882, s. 11, under which the present case falls. The material words in the earlier Act, "so long as any object of the trust remains," are now replaced by the words, "so long as any object of the trust remains unperformed," but it is submitted that the additional word makes no difference, that the case is covered by the decision in *In re Collier* (1), and that the plaintiff is entitled to surrender the policy.

The policy creates a trust in favour of the wife, but the trust assumes that she will survive her husband. Mrs. Cousins having predeceased her husband the trust failed: *Cleaver* v. *Mutual Reserve Fund Life Association.* (2) Subject to that trust, all the interest in the policy is vested in the husband. In *In re Browne's Policy* (3) the holder took out a policy in favour of his wife and children, and when she died and he remarried it was held, after his death, that the policy moneys were payable to the second wife and the children of both marriages jointly. In construing an instrument intended to provide for a wife after her husband's death, it is only a wife who survives her husband who is benefited. The two Irish decisions, *Robb* v. *Watson* (4) and *Prescott* v. *Prescott* (5), are inconsistent. In the former case the decision is to the same effect as in the cases already referred to. In *Prescott* v. *Prescott* (5), which is undistinguishable on the facts, the decision was to the opposite effect. There a wife insured her husband's life and it was held that the trust in his favour was not dependent on his surviving his wife. That case was wrongly decided, and should not be followed.

E. J. Macgillivray for the defendant Society. The Society is much concerned as to the effect of this policy, as it has

(1) [1930] 2 Ch. 37.
(2) [1892] 1 Q. B. 147.
(3) [1903] 1 Ch. 188.
(4) [1910] 1 I. R. 243.
(5) [1906] 1 I. R. 155.

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many current policies in exactly the same form. The question is whether a society can issue a policy of assurance to a husband on his life which will be protected against his creditors, whether his wife survives or not. There is nothing in the present policy which limits the interest to a wife surviving, and there is no mention of the husband's representatives. Nor is there any question here of a second wife taking any benefit under the policy.

The language of s. 11 of the Married Women's Property Act, 1882, is sufficient to distinguish the present case from *In re Collier.* (1)

The cases referred to, other than the Irish cases, turn on the construction of the wording of the policy, not on the Act. Only the Irish cases involve a decision on the scope of the Act. I submit that *Prescott* v. *Prescott* (2) was rightly decided. And see *Schumann, &c.* v. *Scottish Widows' Fund.* (3)

A. P. Vanneck for the defendant executors. The wife took a vested interest under the policy and not one contingent on her surviving husband. In *In re Collier* (1) the case turned on the construction of the policy, but the learned judge went further, and expressed an opinion on the construction of the Married Women's Property Act, 1870. Here the word "unperformed" is sufficient to distinguish that decision; it only refers to the purposes of the trust. There is no authority exactly in point on the question now raised. The dictum of Lord Esher M.R. in *Cleaver* v. *Mutual Reserve Fund Life Association* (4) was quite correct, having regard to the facts of that case. The trusts of that policy were to provide for a surviving wife. In *In re Browne's Policy* (5) the question was purely one of construction of the policy. That was also the case in *In re Adam's Policy Trusts* (6) and in *In re Davies' Policy Trusts.* (7)

These policies, being for the benefit of the wife and children, should be treated as creating in effect a marriage settlement.

(1) [1930] 2 Ch. 37.
(2) [1906] 1 I. R. 155.
(3) (1886) 13 R. C. Sess. 678.
(4) [1892] 1 Q. B. 147.
(5) [1903] 1 Ch. 188.
(6) (1883) 23 Ch. D. 525.
(7) [1892] 1 Ch. 90.

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It is the same as if the husband settled the policy in favour of his wife and children, but did not enter into a covenant to pay the premiums.

Beyfus in reply. The decision in *Schumann's* case turned on the Married Women's Policies of Assurance (Scotland) Act (33 & 34 Vict. c. 93), s. 2, which omits the words in the English Act, "so long as any object of the trust remains unperformed."

Cur. adv. vult.

July 15. Eve J. In April, 1911, and October, 1912, the plaintiff effected with the defendant Society two policies of insurance on his own life whereby the Society, in consideration of the payment of the premiums therein mentioned during the plaintiff's lifetime, agreed on the death of the plaintiff to pay two sums of 15,000*l.* and 3000*l.* Each policy contains a declaration that the policy was issued for the benefit of Lilian Cousins, the wife of the life assured, under the provisions of the Married Women's Property Act, 1882. From the covenant to pay, the words "to the person to whom this assurance is granted or his executors administrators or assigns," are struck out in each policy and no other payee is substituted. Each policy contains a statement to the effect that the sum assured would acquire a surrender value as soon as three full years' premiums had been paid.

Lilian Cousins died on October 3, 1931, having by her will dated July 27, 1931, appointed the defendants, Walter Henry Court and Cecil Hales Court, to be her executors, and they proved the will on December 5 last.

The plaintiff, who has paid all the premiums on the policies down to date, claims a declaration that the sole beneficial interest therein is vested in him, that he is entitled to surrender them to the Society and to be paid the surrender values thereof and to retain the same for his own use and benefit. The defendants contend that the sole beneficial interest in the policies is vested in the defendants, the legal personal representatives of the late Mrs. Cousins.

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Sect. 11 of the Married Women's Property Act, 1882, so far as is material for the determination of the issues raised in this action, enacts that a policy of assurance effected by any man on his own life and expressed to be for the benefit of his wife or of his children or of his wife and children or any of them, shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the assured or be subject to his debts.

According to the language I have just read, the effecting of these policies created a trust in favour of Lilian Cousins. She was the sole cestui que trust, and the trust created was one under or by virtue whereof she would become entitled to the policy moneys in the event of her surviving the assured. Her interest was only a contingent one, but so long as she was alive the policies formed no part of her husband's estate. On her death in his lifetime the trust failed for want of any continuing objects, and thereupon the statutory provision that the policy moneys should not " so long as any object of the trust remained unperformed form part of the estate of the assured," ceased to have any operation, and the policies and the moneys payable thereunder became the property of the assured.

This conclusion, which entitles the plaintiff to the declarations he claims, is consistent with all the reported authorities from *Cleaver* v. *Mutual Reserve Fund Life Association* (1) to *In re Collier* (2), with the possible exception of the Irish case of *Prescott* v. *Prescott* (3), which is distinguishable in that the contract with the insurers was construed as one by which the moneys assured vested absolutely and not contingently in the beneficiary as soon as the policy was effected.

There must be judgment for the plaintiff, but I understand no order as to costs is asked for.

H. L. L.

(1) [1892] 1 Q. B. 147.
(2) [1930] 2 Ch. 37.
(3) [1906] 1 I. R. 155.

The Society appealed, and the surviving executor of the wife also appealed, the other executor having died since the hearing before Eve J. The appeals were heard on November 1 and 2, 1932.

Fergus Morton K.C. and *Macgillivray* for the Society.
A. P. Vanneck for the wife's surviving executor.
Cleveland-Stevens K.C. and *Gilbert Beyfus* for the husband.

Lord Hanworth M.R. On April 13, 1911, a policy was granted by the Sun Life Assurance Society to Stanley Cousins for the sum of 15,000*l.* upon premiums to be paid in accordance with the terms set out in the schedule, and on October 15, 1912, another policy for a sum of 3000*l.* was granted by the Sun Life Assurance Society to Stanley Cousins, again upon the same terms. The terms of the policy were these: "the Society will, on due proof given of the occurrence of the event described in the schedule, of the age of the life assured, and of title, pay the sum assured together with such bonus if any, as may be due in accordance with the provisions of the Sun Life Assurance Act, 1889, and the Laws and Regulations made pursuant thereto And it is hereby declared that this policy is issued for the benefit of Lilian Cousins, the wife of the life assured, under the provisions of the Married Women's Property Act, 1882, Provided also that this policy is subject to the terms and conditions endorsed hereon." I ought to say that in the conditions there was a clause relating to the payment of claims which provided that interest would be allowed from the time when the assured sum and bonuses became payable and also that a surrender value was acquired under the policy as soon as three years' premiums had been paid. On October 3, 1931, the wife, Lilian Cousins, died. On December 5 the will of Lilian Cousins was admitted to probate. The executors of that will were Mr. Walter Henry Court and Mr. Cecil Hales Court. The action was brought by Stanley Cousins, the widower, and he claimed as the widower, upon the facts which I have stated, a declaration that the sole beneficial interest in the policies which I have referred to vested in him, that he was entitled to surrender the same and be paid surrender values out of the funds specified in the policies and retain the same to his use and benefit. The defendants, the Sun Life Assurance Society, and the two executors, Mr. Walter Henry Court and Mr. Cecil Hales Court, have put in separate defences. Substantially the effective point raised by the Sun Life Assurance Society was that the sole beneficial interest in the policies was vested in the defendant executors as the personal representatives of Lilian Cousins, and that is what Messrs. Court asserted also in their defence. They contended that that sole beneficial interest passed to and was vested in them as the personal representatives of Lilian Cousins.

The point raised is of importance to a great number of persons who hold policies of the same nature, and to a large number of insurance societies who issue such policies ; and we are told that certainly according to the views of the Sun Life Assurance Society, their practice has been upon such a policy to treat the benefit of the policy as being vested in the named wife and passing on her death to her personal representatives. They are anxious to have the point determined and to obtain a decision whether or not the view they have acted upon is correct, and as they are more interested than the assured, they have undertaken to pay the costs of all parties concerned in this appeal. Eve J. decided by his judgment that Lilian Cousins had only a contingent interest, and decided therefore in favour of the plaintiff's claim. From that decision an appeal has been brought to this Court.

Our attention has been called to a great number of cases, but the point seems really to be plain enough, and there is certainly one previous decision which supports the view come to by this Court. It will be observed that the policy is declared to be for the benefit of a named wife. Two sections in successive Married Women's Property Acts have dealt with the case of an insurance policy taken out by a husband or a wife for the benefit of the other. Sect. 10 of the Act of 1870 provided that " a policy of insurance effected by any married man on his own life, and expressed upon the face of it to be for the benefit of his wife or of his wife and children, or any of them, shall enure and be deemed a trust for the benefit of his wife for her separate use, and of his children, or any of them, according to the interest so expressed, and shall not, so long as any object of the trust remains, be subject to the control of the husband or to his creditors, or form part of his estate." I think Mr. Beyfus was right in saying that the purpose of the section was to enable a trust to be created appropriating policy moneys to the spouse or children of the assured without his going to the trouble of executing a trust deed. That section has in it the words: "and shall not, so long as any object of the trust remains." In *Robb* v. *Watson* (1) Ross J. took the view that the objects there intended to be referred to were the living objects—the beneficiaries. I cannot otherwise read his judgment. I think the sentence (2): "The objects of the trust may drop off at different times" indicates that his view was that the objects intended to be referred to in s. 10 were persons and not purposes. The later Act of 1882 contained in s. 11 a similar section. The words differ very slightly, but they are definitely different. The section provides that: "A policy of assurance effected by any man on his own life, and expressed to be for the benefit of his wife, or of his children, or of his wife and children, or any of them, ... shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured, or be subject to his or her debts." The difference, it will be noticed, at once, is in the use of the word "unperformed." It seems difficult to apply that word unless it relates to impersonal objects, that is, not to beneficiaries, but to purposes of the trust. But it will be observed that each of those sections creates a trust in respect of the policy moneys where it has been expressed in the policy that it is for the benefit of the wife, or the husband, or the children, as the case may be. The result is that when the policy states the purpose for

(1) [1910] 1 I. R. 243.

(2) [1910] 1 I. R. 248.

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which the policy has been entered into, the Act creates and declares a trust. In the present case we have in the policy the statement simpliciter: "This policy is issued for the benefit of Lilian Cousins, the wife of the life assured, under the provisions of the Married Women's Property Act, 1882"; and that statement creates a trust in her favour. It would seem from those words that she took a vested interest in the policy moneys when the policy was created, and I have looked in vain for any statement introducing a contingency to negative the creation of a vested interest in favour of this named wife. It is suggested that the section provides in certain events for the policy moneys reverting to and becoming part of the estate of the insured person. But when is this to happen? It is definitely declared that such a policy as this creates a trust, and there is a definite direction that "The moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured." In the events which have happened, and according to the facts which we have to consider, can it be said that all the objects of the trust have been performed, or do some of the trusts remain unperformed, so that what I may call a resulting trust to the insured does not arise? On the plain terms of the policy there remains the trust to pay over the moneys due under the policy to the executors of Lilian Cousins, with the result that the trust in her favour was not ended by her death. There is still a trust which is unperformed, and in those circumstances, the terms of the Act negative any interest passing to the husband in the events which have happened.

I will now say a word or two about the cases. It seems clear that our decision is in accordance with the view taken in *Prescott* v. *Prescott.* (1) In that case "A wife effected a policy on her own life in favour of her husband, under the Married Women's Property Act, 1882, for 1000*l.* By the terms of the policy the insurance company promised to pay 1000*l.* to the husband or his executors, administrators, or assigns, on the death of the wife. The husband paid the premiums on the policy, and predeceased the wife :—Held, that the trust created by the policy and the Act in favour of the husband was not dependent on his surviving his wife, and that the policy belonged to his executors and not to his wife." The policy was expressed to be in favour of Mr. William Prescott, and the trust that remained was similar to the trust here, a trust to pay the policy moneys, as and when they became due, to the personal representatives of Mr. William Prescott. It is quite true that in the policy there was a covenant to pay to the named person and to his executors and administrators ; but, as the Master of the Rolls pointed out, the addition of those words in the covenant to pay do not make any alteration, because the plain meaning of the policy is that it was for the benefit of William Prescott and the other words add nothing and detract nothing. The plain effect of the policy is to create a vested interest which is not expressed to be subject to any contingency. A different view has however been expressed, and the shortest way of dealing with it is to refer to *In re Collier* (1), which was decided by Clauson J.. Clauson J. applies *In re Browne's Policy* (2), and prefers *Robb* v. *Watson* (3) to *Prescott* v. *Prescott.* (4) But it should be observed that in *In re Browne's Policy* (2) the policy in question was not expressed to be in favour of a named wife, and it was decided upon the construction of that policy that the wife indicated there was some person who fulfilled the qualification of a wife who survived the husband who had taken out the policy. In *Robb* v. *Watson* (3) the policy was for the sole benefit of his named wife, but it was held on the construction of s. 10 of the Act of 1870 that the intention was that she must survive him. In the present case, which arises under the Act of 1882 and where there is a persona designata, the wife indicated by name, an absolute interest is taken by her by virtue of the statute and a trust created in her favour. That trust still remains uncompleted and unperformed until the date shall arrive when she, or, as it is now, her personal representatives,

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(1) [1906] 1 I. R. 155.

(1) [1930] 2 Ch. 37.
(2) [1903] 1 Ch. 188.
(3) [1910] 1 I. R. 243.
(4) [1906] 1 I. R. 155.

receive the money, and while that state of things continues the Act negatives any interest passing to the husband.

For these reasons I am of opinion that the judgment of Eve J. should be reversed, and that judgment should be in favour of the defendants and a declaration made accordingly.

LAWRENCE L.J. The policies in this case were effected by the plaintiff for the benefit of his wife, Lilian Cousins, under s. 11 of the Married Women's Property Act, 1882. That section differs somewhat in its language from s. 10 of the Married Women's Property Act, 1870. [His Lordship read s. 10.] Counsel has called our attention to two cases in which it has been decided that a policy effected under that section by a married man on his own life, and expressed upon the face of it to be for the benefit of his wife, does not confer an absolute vested interest on the wife, but only a contingent interest, the contingency being that the wife should survive the husband. The first of those cases in order of date is the Irish case of *Robb* v. *Watson*. (1) Ross J. in that case seems to have based his decision on the expression: "and shall not, so long as any object of the trust remains, be subject to the control of the husband, or to his creditors, or form part of his estate." It appears from the judgment that the learned judge construed the expression, "so long as any object of the trust remains," as meaning "so long as any beneficiary is in existence," construing the word "object" as an equivalent to "beneficiary," and so construing it he came to the conclusion that as the beneficiary died before the policy had matured, there was no longer any object of the trust remaining, with the result that the policy reverted to and became part of the estate of the husband. It is to be noted that in that case the policy was effected "for the sole benefit of his wife, Elizabeth Watson, for her separate use." The second of the cases is *In re Collier*. (2) Clauson J. in that case decided that a policy effected for the benefit of a wife under s. 10 of the 1870 Act did not vest in her absolutely, on a wider ground than that taken by Ross J. in the

(1) [1910] 1 I. R. 243. (2) [1930] 2 Ch. 37.

case of *Robb* v. *Watson.* (1) He decided that the object of the Act was to enable a husband to provide for his widow on his death, and that the words " for the benefit of his wife " in the policy meant for the benefit of the wife if she should survive him and become his widow, and he expressed the opinion that " the Act is aimed at enabling provision to be made for a widow and is so framed as not to give a husband power to confer the benefit of the policy upon any wife, unless she by surviving her husband becomes his widow."

Sect. 11 of the Act of 1882 is worded differently. [His Lordship read the section.] The words " any object " in the phrase, " so long as any object of the trust remains unperformed," cannot mean " any beneficiary "; but necessarily means " any purpose." Although the wording of the two sections is different I am inclined to think that they are in substance the same, so far as the point that we have to decide is concerned. I think the preferable construction of both sections is to read the word " object " whenever it is used as equivalent to " purpose," and for myself I see no substantial difference between a policy effected for the benefit of a named wife, under s. 10 of the 1870 Act, and a similar policy effected under s. 11 of the 1882 Act. If that be the true view, it follows that in my opinion the decisions in *Robb* v. *Watson* (1) and *In re Collier* (2) were erroneous, but, as those cases were both decided under s. 10 of the earlier Act, it is unnecessary to come to a final conclusion upon that point. Under the 1882 Act a policy effected by a man on his own life, and expressed to be for the benefit of a named wife, operates in my judgment as a valid declaration of trust inter vivos in favour of the wife, giving her a vested absolute beneficial interest in the policy and the moneys thereby assured from the time when the policy is effected. In *In re Adam's Policy Trusts* (3), which was a case of a policy effected under the 1870 Act by a married man on his own life for the benefit of his wife and children, Chitty J. said (4): " The view I take of the policy is this: it is a declaration of trust operating inter vivos, and is a good declaration of trust. . . . . It appears to me that the effect of the policy and the Act taken together is to constitute a declaration of an executed trust, and that all the Court has to do is to express its view of the construction of the two instruments taken together. Now upon the policy being effected the settlor does not reserve to himself any power of appointment; therefore this is not an executory trust, but a trust declared on the face of the instrument. The question then is, what is the true construction of the instrument?" In my opinion the passage which I have quoted applies to a policy effected under the 1882 Act, with the result, in the present case, that as the plaintiff has declared in the policy that it is effected for the benefit of his named wife simpliciter, that wife takes an absolute beneficial interest in the policy. The plaintiff might, no doubt, have effected a policy under s. 11 for the benefit of his wife if she should survive him (as was the case in *Cleaver* v. *Mutual Reserve Fund Life Association* (1) and as was the case in *In re Fleetwood's Policy* (2)), or he might have taken out a policy for the benefit of any wife who might survive him and become his widow (as was held to have been the case in *In re Browne's Policy* (3)), but that is not what he has done here. He has chosen to effect a policy simply for the benefit of his then living wife, and has thus created a trust, of which it cannot be said that its purpose came to an end, or that, in the words of the section, there was no longer any object of the trust remaining to be performed when his wife died in his lifetime; there being a vested interest in the wife that interest passed on her death to her executors as part of her estate. It is a curious fact, in view of the argument which was presented by Mr. Cleveland-Stevens and Mr. Beyfus, that in *In re Fleetwood's Policy* (2) it was argued by counsel that the policy was not one under the Act, because the benefit conferred on the wife was expressed to be contingent on her surviving the assured. In answer to that argument Tomlin J. said (1): "It is true it"—that is the policy—"is expressed to be for the benefit of his wife in a certain event only, but the fact that the benefit is of a limited or contingent character does not prevent it from being a benefit within the meaning of this Act. I think, therefore, that the policy creates a trust in favour of the wife, but only in the terms of the trust."

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(1) [1910] 1 I. R. 243.
(2) [1930] 2 Ch. 37.
(3) 23 Ch. D. 525.
(4) Ibid. 527.

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(1) [1892] 1 Q. B. 147.
(2) [1926] Ch. 48.
(3) [1903] 1 Ch. 188.

For the reasons I have stated I agree that this appeal succeeds and ought to be allowed.

ROMER L.J. I agree. The language of s. 11 of the Married Women's Property Act, 1882, and of the policies that we have to consider in this case, are in my opinion much too strong to allow us to give effect to the arguments addressed to us on behalf of the respondent to these appeals. Sect. 11, which I will only read so far as it is material for the present purpose and so far as it relates to this case, says that: "A policy of assurance effected by any man on his own life, and expressed to be for the benefit of his wife . . . . shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured or be subject to his or her debts." I desire to make two observations upon that section. The first is that you are referred to the policy itself to ascertain the objects of the trust which the Act says is created by the policy, and must also look at the policy for the purpose of finding the interests which those objects take in the policy money. The other observation that I make is, that the words "so long as any object of the trust remains unperformed" clearly mean so long as any object of the trust remains to be performed; in other words, that the policy moneys shall not form part of the estate of the insured or be subject to his or her debts until the trusts have come to an end. Looking at the two policies in this case, I find that they are expressed to be for the benefit of the testator's wife Lilian Cousins. That being

(1) [1926] Ch. 53.

so, there is a trust created in favour of Lilian Cousins. I can see nothing in the Act that would warrant us coming to the conclusion that the husband cannot, by means of this section, provide a vested interest for his wife and his children during his own lifetime but can only provide interests for them contingent on their surviving him. In the policies themselves I cannot find the remotest indication that the husband intended the wife's interest to be contingent on her surviving him. If he had so wished nothing was easier than for him to have said so in the policies themselves. In my opinion, therefore, there was a trust created in favour of the named wife, Lilian Cousins; that trust did not come to an end on her death, but persisted and remains to be performed in favour of her personal representative. It follows that, in my opinion, *Prescott* v. *Prescott* (1), which was really indistinguishable from the present case, was rightly decided. I express that view in spite of the fact that Clauson J. had doubts as to its correctness. The only cases which can be relied upon as pointing to the opposite conclusion are the two to which reference has been made by the Master of the Rolls and Lawrence L.J.—namely, *Robb* v. *Watson* (2) and *In re Collier* (3), in the latter of which Clauson J. expressed his concurrence with the decision of Ross J. in *Robb* v. *Watson.* (2) In *Robb* v. *Watson* (2) the learned judge had to deal, not with s. 11 of the Act of 1882, but s. 10 of the Act of 1870, and there, as has been pointed out, it is provided that the policy moneys shall not, "so long as any object of the trust remains, be subject to the control of the husband or to his creditors, or form part of his estate." Ross J. clearly took the view that those words meant so long as any of the cestuis que trust are living. In the first place it is not customary in this country, when it is desired to state that a certain person is living, to do so by stating that he remains; nor is it customary, when it is desired to limit a life interest, to direct the income to be paid to the person named so long as he remains; nor again, if it is desired to give an interest contingent upon the beneficiary surviving a certain event, is it customary to say if he remains. I decline to attribute to the Legislature the intention of using the word "remains" in such an extraordinary sense as that attributed to them by Ross J. Equally it is to be observed that if the learned judge was right, and the word "remains" in that section was equivalent to "is still living," it would not be possible to give the children of the father who effected the policy anything but a life interest. For these reasons it seems to me that the case of *Robb* v. *Watson* (1) was not correctly decided, but however that may be, the words of the Act of 1870 are different from the words that are used in the section of the Act of 1882 with which we have to deal; and it may be sufficient to say that having regard to the words of that section this appeal should in my opinion be allowed.

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(1) [1906] 1 I. R. 155.
(2) [1910] 1 I. R. 243.
(3) [1930] 2 Ch. 37.

Appeal allowed.

Solicitors: *Linklaters & Paines; G. C. T. Money; W. H. Court & Son.*

H. C. G.

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(1) [1910] 1 I. R. 243.

Disapproved. In re Isle of Thanet Electricity Supply Co. [1950] 1 Ch. 161

Overruled. Scottish Insurance Corpn., Ltd. *v.* Wilsons and Clyde Coal Co., Ltd. [1949] 1 All E.R. 1068.

Overruled. Scottish Insurance, Ld. Case. [1949] A. C. 462

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June 15;
July 28.
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Nov. 2, 3, 4.

In re WILLIAM METCALFE AND SONS, LIMITED.

[No. 0072. 1932.]

Company—Voluntary Liquidation—Construction of Articles—Preference and Ordinary Shares—Surplus Assets distributable—Right of Preference Shareholders to share rateably with Ordinary Shareholders in distribution—No exhaustive Definition of Rights.

A company incorporated in 1897 with a capital of 24,000*l.* divided into preference and ordinary shares of 10*l.* each, in 1928 passed a resolution for voluntary winding-up, having previously entered into a contract to sell the bulk of its business to another company. At the date of the commencement of the winding-up 800 preference and 1400 ordinary shares had been issued fully paid. Preference dividends had been regularly paid, but since 1918 the profits had been insufficient to allow of any declaration or payment of dividend on the ordinary shares.

By clause 5 of the company's memorandum of association it was provided that the preference shares should confer the right to a fixed cumulative dividend of 5 per cent. per annum on the capital paid up thereon, and should rank as to capital as well as dividends in priority to the other shares present and future.

Art. 12 of the Articles of Association provided that the initial capital should be divided into 1000 preference shares of 10*l.* each and 1400 ordinary shares of 10*l.* each, and that the preference shares should confer the right to a fixed cumulative dividend at the rate of 5*l.* per cent. per annum, and the right in a winding-up to payment of capital in priority to all other shares.

After payment off of debentures and all other liabilities and repayment of the paid-up capital to the shareholders, there remained surplus assets available for distribution to the value of 21,000*l.*, the bulk of which represented accumulated profits.

Held (affirming Eve J.'s decision), that the memorandum and articles could not be construed as either expressly or impliedly depriving the preference shareholders of their right as contributories to share in the distribution of these surplus assets pari passu with the ordinary shareholders.

Summons.

The facts, as stated by Eve J. in his judgment, were as follows:—

The company was registered in 1897 to acquire and take over as a going concern the business of corn-millers, corn merchants and seed, hay, straw and manure merchants theretofore carried on at Malton in the North Riding of Yorkshire, with a capital of 24,000*l.*, divided into 2400 10*l.*

shares, of which 1000 were preference and 1400 were ordinary shares. In May, 1908, the company, by special resolution, constituted itself a private company, and in December, 1928, it accepted an advantageous opportunity of selling an important part of its business, and resolved to be wound up voluntarily. At the commencement of the winding-up 800 preference and 1400 ordinary shares had been issued and were fully paid; the dividend on the former had been paid down to date, but no dividend had been paid on the ordinary shares subsequent to August, 1918. After payment and discharge of the debenture debt and all other the debts and liabilities of the company, the paid-up capital on the preference and ordinary shares was repaid in 1929 and 1930 respectively, and there remain in the hands of the liquidator surplus assets available for payment of the costs of liquidation and for distribution amongst the shareholders of an approximate value of 21,000*l.* The bulk of this sum is attributable to accumulated profits.

By clause 5 of the company's memorandum of association it is provided that the 1000 preference shares shall confer the right to a fixed cumulative preferential dividend at the rate of 5*l.* per cent. per annum upon the capital paid up thereon, and shall rank, as to capital as well as dividends, in priority to the other shares then present and future, and that upon any increase of capital the company was to be at liberty to issue any new shares with any preferential, deferred, qualified or special rights, privileges or conditions attached thereto, but not so as to prejudice the preferential rights thereby attached to the preference shares in the initial capital. With this must be read article 12, which states that the initial capital shall be divided into 1000 preference shares of 10*l.* each and 1400 shares of 10*l.* each, and that the preference shares shall confer the right to a fixed cumulative preferential dividend at the rate of 5*l.* per cent. per annum, and the right in a winding-up to repayment of capital in priority to all other shares. By article 82, every member on a show of hands had one vote only, and, in case of a poll, one vote for every share held by him, but no member was entitled to vote at any meeting unless he was the holder of at least ten shares.

The liquidator took out the summons for the determination of the question whether the surplus assets were divisible rateably among the preference and ordinary shareholders, or whether they belonged to the latter only.

A. J. Belsham for the liquidator.

J. H. Stamp for the ordinary shareholders. The memorandum contains a definition of the rights of the preference shareholders, and the question is whether that definition is complete and exhaustive, as I submit it is. In each case it is a question of construction of the memorandum, but in giving weight to the words used the Court should consider general principles. Here the most salient point which distinguishes the present case from all other cases of the kind, except *Collaroy Co., Ld.* v. *Giffard* (1), is that the definition of rights is in one continuous sentence: "shall rank as to capital as well as to dividends in priority to all other shares." Any right, other than a right to dividends, which a shareholder has in winding-up, is a right as to capital. The clause is therefore exhaustive of the preference shareholders' rights. It cannot mean that the preference shareholders are to rank as to capital partly in priority to and partly pari passu with the ordinary shareholders.

[Eve J. Do you say that surplus assets are capital ?]

Yes, the shareholder pays no income tax on them, therefore they must be capital, though qua the company it is a distribution of surplus assets. The surplus assets are "part and parcel of the property of the company—part and parcel of the joint stock or common fund—which at the date of winding-up represented the capital of the company": per Lord Macnaghten in *Birch* v. *Cropper.* (2) Lord Macnaghten agreed that in a winding-up one was not concerned with paid-up capital at all; it was a question of assets. The moment before the winding-up the ordinary shareholders could have passed a resolution dividing the whole of the surplus assets or accumulated profits between them. The winding-up cannot materially alter the rights of parties, and the shareholders could not have contemplated that a resolution to wind up would do so.

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(1) [1928] Ch. 144.

(2) (1889) 14 App. Cas. 525, 546.

[Eve J. When preference shares were first introduced they generally bore a small proportion to the ordinary shares, but now it is the other way about. The preference shareholders can say, equally with the ordinary shareholders, that they have provided the capital.]

The wording of the Companies Acts has not been fully appreciated in all the cases: see per Lord Fitzgerald in *Birch* v. *Cropper.* (1) The judgments in *Birch* v. *Cropper* (1) are of great weight, and perfectly sound in principle. They fully establish the proposition that the rights of both preference and ordinary shareholders in a winding-up are rights as to capital.

As far as dividends are concerned the memorandum gives the whole measure of the preference shareholders' rights; why should not this be the same as to capital?

The word "rank" means to stand in a certain order of priority as regards a particular subject-matter.

This case goes beyond every other case which has come before the Courts, except *Collaroy Co., Ld.* v. *Giffard.* (2) In my argument in that case I laid stress on the use of the definite article "the" before "right," and Astbury J. also did so in his judgment. Preference shares by their very nature carry limited and defined rights. In *Will* v. *United Lankat Plantations Co., Ld.* (3), the House of Lords held that preferential rights as to dividend were exhaustive. It is necessary to consider the language of the memorandum and articles in the various cases in which it has been held that preference shareholders were entitled to share in surplus assets. The language used was quite different from the present case in *In re Espuela Land and Cattle Co., Ld.* (4) The decision can be supported on the construction of the memorandum and articles. In *In re National Telephone Co.* (5) the

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(1) 14 App. Cas. 541.

(2) [1928] Ch. 144.

(3) [1914] A. C. 11.

(4) [1909] 2 Ch. 187.

(5) [1914] 1 Ch. 755, 766.

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memorandum was much more favourable to the ordinary shareholders than in the *Espuela* case. (1) Sargant J. there applied the principle that the definition of the preference shareholders' rights was intended to be exclusive. There the preference shareholders were to have "no other participation in profits." Again, in *In re Fraser & Chalmers, Ld.* (2), the language used was quite different from the present case, and the decision was only that the right of the preference shareholders to priority in repayment of their capital did not by itself negative their right to share equally in the distribution of surplus assets. Not one of the points now relied on arose in that case. The decision in *In re Fraser & Chalmers, Ld.* (2), was held to be covered by the decision in the *Espuela* case (1), and in that case Swinfen Eady J. was simply construing the articles and did not intend to lay down any canon of construction, as was recognized by Astbury J. in *In re Fraser & Chalmers, Ld.* (2) The decision of your Lordship in *Anglo-French Music Co., Ld.* v. *Nicoll* (3) is very far removed from the present case, and that in *In re John Dry Steam Tugs, Ld.* (4), is distinguishable. It did not contain the special features of this case at all. Here the direction is that the preference shares are to rank both as regards dividends and capital in priority to the ordinary shares, and I submit that these priority rights are exhaustive.

W. M. Hunt for the preference shareholders. I submit that there is nothing in the memorandum or articles to take away the right of the preference shareholders to share surplus assets equally with the ordinary shareholders. It was argued that the rights of the preference shareholders were exhaustive, because they were all contained in one sentence, but the same was the case in *Anglo-French Music Co., Ld.* v. *Nicoll.* (3)

Prima facie the rights of all shareholders, except so far as modified by the articles, are equal: per Lord Herschell in *Birch* v. *Cropper.* (5) "They are members of the company, and as much shareholders in it as the ordinary shareholders are." That principle was adopted by Swinfen Eady J. in

(1) [1909] 2 Ch. 187.
(2) [1919] 2 Ch. 114.
(3) [1921] 1 Ch. 386.
(4) [1932] 1 Ch. 594.
(5) 14 App. Cas. 525, 531.

In re Espuela Land and Cattle Co., Ld. (1) In the absence of a clear provision to the contrary the shareholders' rights are equal: per Farwell L.J. in *Will* v. *United Lankat Plantations Co., Ld.* (2)

Sargant J., in *In re National Telephone Co.* (3), treated the fact that the preference shares were participating shares as an argument the other way to show that the rights were exhaustive. But here the fact that the shares are not participating is an argument in favour of the preference shareholders. A preferential right is no renunciation of ordinary rights. I submit there is no distinction to be found between the present case and *In re Espuela Land and Cattle Co.* (1) or *Anglo-French Music Co., Ld.* v. *Nicoll* (4), or, except that the rights of the preference shareholders were there defined under two heads, from the decision in *In re John Dry Steam Tugs, Ld.* (5)

[He referred to Stiebel on Companies, vol. i., 3rd ed., p. 250, and vol. ii., p. 1118, and Buckley on Companies, 4th ed., p. 450.]

J. H. Stamp in reply. There is a fallacy in Stiebel on Companies in his division of the rights of preference shareholders into two; it is not to be found in the Companies Acts, or in *Birch* v. *Cropper.* (6) A shareholder renounces his rights to any further dividend by accepting a fixed preferential dividend. In the same way he accepts a limitation on his rights in a winding-up by obtaining a prior right to repayment of capital.

Cur. adv. vult.

July 28. EVE J. By this summons the liquidator in the voluntary winding-up of William Metcalfe & Sons, Ld., submits for determination the question whether the surplus assets of the company remaining after payment and discharge of all the debts and liabilities of the company, and the costs of the winding-up and the repayment of all capital paid up on the preference and ordinary shares in the capital of the company, are distributable rateably among the holders of both the preference and the ordinary shares or belong to the latter only.

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(1) [1909] 2 Ch. 187.
(2) [1912] 2 Ch. 571, 579.
(3) [1914] 1 Ch. 755.
(4) [1921] 1 Ch. 386.
(5) [1932] 1 Ch. 594.
(6) 14 App. Cas. 525, 531.

The question is one which has arisen not infrequently in the past, and as it is one which falls to be determined by the construction imposed on the contractual relations subsisting between the two classes of shareholders under the constitution of the particular company, it is, perhaps, not surprising to find that there is in the books an assortment of cases from which each side may extract something in support of the view for which it is contending.

It is necessary to keep in mind the true nature of the subject-matter in dispute; the expression "surplus assets" in this and similar cases signifies something different from the expression "capital"; surplus assets are part and parcel of the property of the company not required for the discharge of its liabilities or for returning to the shareholders the capital they have paid up; they are part of the joint stock or common fund which, at the date of the winding-up, represented the capital of the company, but they are no part of the repayable capital. It has ex hypothesi been repaid before they came into existence.

These assets are distributable amongst the contributories in accordance with their contractual rights inter se, and the question I have to determine is the true interpretation of these rights in this case. In approaching the solution of this question it is to be borne in mind that every person who becomes a member of a company, limited by shares of equal amount, becomes entitled to a proportionate part in the capital of the company and, unless it be otherwise provided by the regulations of the company, entitled as a necessary consequence to the same proportionate part in all the property of the company. Preference shareholders are members of the company, and as much shareholders in it as the ordinary shareholders are, and they must be treated as having all the rights of shareholders except so far as they renounced those rights on their admission to the company. It is for the ordinary shareholders here to establish that the preference shareholders renounced their rights to participate in the surplus assets now distributable.

I think that is all that is relevant in the company's regulations. Do they operate to restrict the rights of the preference shareholders to the preferential dividend and priority in repayment of capital; in other words, are they to be construed as an exhaustive exposition of the rights of the preference shareholders? Must the preference shareholders be deemed to have renounced all other rights as shareholders in the property, or, to use Lord Macnaghten's phraseology, "in the joint stock or common fund which, at the date of the winding-up, represented the capital of the company," in exchange for the priority advantages, or were these advantages in the nature of an addition to those resulting from their position as members of the corporate body?

It is not suggested that the mere attachment to preference shares of: (1.) a preferential right to a dividend, even where it is not limited to a fixed rate, but is so expressed as to extend to further profits available for distribution after providing a dividend for the ordinary shareholders, and (2.) a prior right to repayment of capital in a winding-up, would even prima facie bar the preference shareholder from participating in surplus assets, and it is admitted that if this is all the present contract effects, cadit quaestio.

What, then, are the grounds advanced in support of the argument which seeks to establish that, although the rights conferred upon the preference shareholders in this case do not prima facie bar them from participating in surplus assets, the contract ought so to be construed as creating that bar? Some reliance is placed upon the facts that the definite article is used before the word "right" in the memorandum and in article 12, and that the two rights, the one to the preferential dividend and the other to the priority as to capital, are both dealt with in one clause or formula, as it has been called. I cannot appreciate this argument. Is it really suggested that the contract would bear a different construction if the word "right" were prefaced with the indefinite article, or the two rights were specified in separate sentences ? Somewhere there must be stated in unequivocal terms the essential characteristics by which the preference shares are to be distinguished from the ordinary ones, and nowhere in the memorandum or in the articles is there a word to indicate anything beyond an intention to state these two characteristics, and I cannot believe that the statement of these in one and the same sentence can in itself afford the smallest clue to the true construction of the contract.

Nor does the suggestion that the direction as to ranking in priority impliedly negatives any pari passu ranking impress me. As I have already observed, and as is admitted and, indeed, been decided in several cases, an attachment to preference shares of a priority to return of their capital does not bar their participation in surplus assets, and if this is right I do not understand how a direction as to ranking in priority can raise an implication negativing pari passu ranking.

The contention that there is nothing to imply that, after repaying the preference capital, there is to be any return of capital eo nomine to any one, I confess I do not understand. If it means that what is spoken of as "capital" in the memorandum and articles is the 24,000*l.* and nothing else, the implication surely must be in favour of the claim of the preference shareholders that surplus assets were left out of consideration and were to devolve upon all the contributories rateably and unaffected by the priority rights to profits and paid-up capital. I do not accept the view that there is nothing pointing to any distinction between assets required to repay capital and other assets ; the former are specially dealt with, the latter are left to reach their statutory destination.

And when one realizes that surplus profits are created by the employment of the capital contributed by both classes of shareholders, and do not come into existence until each class has been repaid the whole of the capital embarked in the business, I do not think the right to participate in the surplus evidences such a logical inconsistency between the rights of the preference shareholders in a winding-up and their rights while the company is a going concern as to warrant the conclusion that they have renounced their right to participate.

For, after all, what the ordinary shareholder has to establish in this case is that the preference shareholder has renounced his statutory right in the surplus property. It cannot of course be suggested, by the use of such phrases as "the contract defines the entire rights of the preference shareholders," or "the provisions of the contract contain the whole of the rights conferred on the preference shares," that the preference shareholders have abandoned their rights as contributories to attend and vote at meetings of the company, to become and act as directors if invited so to do, or to exercise any statutory powers conferred upon them, and, in substance, the one and only right which they are alleged in this case to have renounced is this right to share in the surplus property. The existence of the particular privileges they enjoy is admittedly not inconsistent with the retention by them of their right to share in the surplus, and if it really was contemplated and intended that they should be excluded from the enjoyment of that right, all that was necessary to make it quite clear was to introduce a few words of qualification at the end of clause 5 of the memorandum or of article 12; for example, a statement that the preference shares should not confer any further right to participate in profits or assets.

There is one feature, common to all the cases, which calls for comment, though I do not see how it can affect the question of construction. In the case of a successful company, and one may take it that success is aimed at and anticipated in the great majority of cases, the imposition of a limit on the preferential dividend means that the bulk of the divisible profits goes to the ordinary shareholders while the company is a going concern, and in those circumstances, when the company ceases to do business, the rateable division of surplus assets amongst the two classes does not strike me as being otherwise than a fair adjustment when what remains of the property, created by the employment of the joint capital, comes to be dealt with.

If the company is unsuccessful, surplus assets are not likely to come into being, but there may be cases—indeed, the present would seem to be such a one—where the profits have not been sufficient to justify the payment of dividends on the ordinary shares, and where, therefore, the surplus represents assets which, at some future date, had the company continued to trade, might have become available for dividends on the ordinary shares. In such a case, a winding-up and rateable distribution of surplus assets amongst both classes would appear to work a hardship on the ordinary shareholder, but the answer is that the contract has not been so framed as to provide for this particular contingency, and its happening does not justify an introduction into the contract of a term which is not to be found therein. Moreover, in this connection it is to be noted that, in this company throughout, the ordinary shareholders held a substantial majority of votes, and at any time prior to the winding-up they could have distributed amongst themselves the accumulated profits, and further, no winding-up resolution could have been carried without their support.

In my opinion there are no sufficient grounds in this case for holding that the preference shareholders renounced their rights as contributories to participate in the surplus assets, and I answer the liquidator's submission by declaring that both classes are entitled to share therein.

I am, of course, aware that in so doing I am arriving at an opposite conclusion to that reached by Astbury J. upon language indistinguishable from that employed in this case: see *Collaroy Co., Ld.* v. *Giffard.* (1)

In ordinary circumstances, whatever my own opinion might have been, I should have felt it my duty to adopt his view without comment and there leave the matter, but in view of the diversity of opinion on this subject already disclosed in the reports, and of the fact that in the report of the learned judge's judgment four pages are devoted to an attempt to reconcile a former decision of his own with the one he was then about to pronounce, I felt—without, of course,

(1) [1928] Ch. 144.

presuming to express an opinion whether that attempt was successful or not—that the occasion was a sufficiently exceptional one to justify me in expressing my own views, notwithstanding the decision in the *Collaroy* case. (1)

The costs of all parties will be taxed as between solicitor and client and be paid out of the assets.

H. L. L.

C. A.

An ordinary shareholder appealed. The appeal was heard on November 2, 3 and 4, 1932.

J. H. Stamp for the appellant.

W. M. Hunt for a preference shareholder was not called upon.

A. J. Belsham for the liquidator.

Lord Hanworth M.R. This appeal is from a judgment delivered by Eve J. Speaking for myself I should have been prepared to leave the matter as it was left by Eve J. and to express my concurrence with his reasons, but out of respect to the strenuous argument which has been presented to us by Mr. Stamp I feel that I ought to express my opinion upon the authorities.

The short point we have to determine is: What are the rights of the ordinary and preference shareholders in the winding-up of William Metcalfe & Sons, Ld., in respect of a surplus which remains after discharging all the liabilities of the company and returning the share capital subscribed by the members of the company? The argument presented to us was on behalf of the ordinary shareholders, and they claim that they alone are interested in this surplus. They claim that by the memorandum and articles of association the rights of the preference shareholders are exhaustively determined, and that they cannot establish a claim to parity as between them and the ordinary shareholders in respect of this surplus. They say that all the ordinary rights of the preference shareholders as members of the company have been displaced, and that their only rights are to receive priority in payment both of the 5 per cent. dividend and the return of their capital.

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(1) [1928] Ch. 144.

It is necessary, therefore, to look at some of the cases which have dealt with this matter before. First, I should like to refer to a case to which our attention was called only a few days ago in which the position of shareholders of a company is made clear. In *Houldsworth* v. *City of Glasgow Bank* (1) Lord Cairns says (2): "We are accustomed to use language as to such a sale and purchase"—that is, of a sale and purchase of shares or stock in a company—"as if the thing bought or sold were goods or chattels, but this it certainly is not. The contract which is made is a contract by which the person called the buyer agrees to enter into a partnership already formed and going, taking his share of past liabilities, and his chance of future profits or losses. He has not bought any chattel or piece of property for himself; he has merged himself in a society, to the property of which he has agreed to contribute, and the property of which, including his own contributions, he has agreed shall be used and applied in a particular way and in no other way." Those phrases indicate the social relation of the corporators who have joined in a company.

In the present case the company is being wound up; it has discharged all liabilities and it has returned the capital to the members. There is a sum left over—a surplus. The nature of that surplus was discussed in *Inland Revenue Commissioners* v. *Burrell.* (3) It was there said, after a careful examination of the relevant cases, that this surplus retains no definitive characteristics—it is wrong to call it capital, but, on the other hand, it is not a source of dividends, because no dividend can be paid; it represents undistributed profits accumulated it may be during a number of years, but it cannot be dealt with as a fund for payment of dividends by the directors, for the winding-up has displaced their powers. In *Birch* v. *Cropper* (4) Lord Macnaghten said (5): "I think it rather leads to confusion to speak of the assets which are the subject of this application as 'surplus assets' as if they were an accretion or addition to the capital of the company

(1) (1880) 5 App. Cas. 317.
(2) Ibid. 324.
(3) [1924] 2 K. B. 52.
(4) 14 App. Cas. 525.
(5) Ibid. 546.

capable of being distinguished from it and open to different considerations. They are part and parcel of the property of the company—part and parcel of the joint stock or common fund—which at the date of the winding-up represented the capital of the company." But I repeat it has lost all definitive characteristics such as would enable one to apply the word "capital" to it or to call it a dividend fund. In *In re Bridgewater Navigation Co.* (1), which went on appeal to the House of Lords under the name of *Birch* v. *Cropper* (2), Cotton L.J. says (3): When a winding-up has taken place "all question of preference is now at an end, and the shareholders are to be dealt with as having equal rights, because the provision in the articles creating the preference shares as regards dividend to arise on the working of the capital is at an end." In the House of Lords Lord Herschell said of preference shareholders (4): "They are members of the company, and as much shareholders in it as the ordinary shareholders are; and it is in respect of their thus holding shares that they receive a part of the profits"; and at the end of his speech he adds (5): "When the whole of the capital has been returned both classes of shareholders are on the same footing, equally members and holding equal shares in the company, and it appears to me that they ought to be treated as equally entitled to its property."

We start, therefore, the consideration of this question with the two principles in our minds, that the corporators have entered into a contract by which they become partners in the venture, and that when there are surplus assets left over they are to be dealt with as between the members on the basis of equality, whatever were the original and limited rights of the preference shareholders earlier.

The next cases with which I have to deal are those which have turned upon the express terms of the memorandum and articles of association. It is important, therefore, to bear

(1) (1888) 39 Ch. D. 1.
(2) 14 App. Cas. 525.
(3) 39 Ch. D. 25.
(4) 14 App. Cas. 531.
(5) Ibid. 538.

in mind the exact terms of the memorandum and articles of association in the present case. By clause 5 of the memorandum it is provided: "The capital of the Company is 24,000*l.*, divided into 1000 preference shares of 10*l.* each and 1400 ordinary shares of 10*l.* each, and such preference shares shall confer the right to a fixed cumulative preferential dividend at the rate of 5*l.* per cent. per annum upon the capital paid up thereon, and shall rank as to capital as well as dividends in priority to the other shares present and future." That was carried out in the articles by article 12, which provides that the capital shall be divided as I have already expressed, "and the preference shares shall confer the right to a fixed cumulative preferential dividend at the rate of 5*l.* per cent. per annum, and the right in a winding-up to repayment of capital in priority to all other shares." Articles 124 to 127 also deal in some measure with this matter. Article 127 is: "All dividends shall be calculated and paid rateably on the amount paid up from time to time on each share, but in such payment regard shall be had to the rights of the shareholders *inter se* to priority of payment or otherwise." In those articles one does not find any assistance in a matter which is later in date than the appropriation of dividends and the return of capital, nor does one find any assistance in s. 247 of the Companies Act, 1929, which provides that the property of a company is on its winding-up after satisfying its liabilities to be divided among the members according to their rights and interests in the company. But although the memorandum and articles of association have described in the terms that I have already read what the preference of the preference shareholders is, it is I think clear that that preference is not carried to a period when those articles have already been complied with, and when the time has come to deal with a different sum over which neither director nor shareholder has any power. It must further be remembered that under article 82 every member has a vote, and an equality of voting power is maintained by that article as between the preference and the ordinary shareholders.

That being the nature of the memorandum and articles of association in this case, is there sufficient ground for holding that the rights of the preference shareholders have been defined and limited in regard to this surplus? Is there anything which expressly says that the right of equality of the preference shareholders has been entirely displaced and their rights limited to a 5 per cent. dividend and priority in the return of capital? I find it impossible, as Eve J. has found it impossible, to say that the words are sufficient to displace that parity between members of the company whose voting power is equal and who are all corporators in this concern. When I turn to the relevant authorities I find in *In re Espuela Land and Cattle Co.* (1) that Swinfen Eady J., as he then was, said (2): "In the absence, however, of any provision to the contrary, the rights of the shareholders are equal. Where the shares are of unequal amounts the surplus assets must be distributed rateably according to the nominal amount of the shares." He definitely affirms that the rights of the shareholders are equal, and in that case he did not find anything to disturb that equality so far as regards the surplus assets. In *Will* v. *United Lankat Plantations Co.* (3) Farwell L.J., after quoting certain words in *In re Espuela Land and Cattle Co.* (1), said (4): "It is therefore open to contention that the attachment of a preferential dividend does not impliedly exclude the right to participate in surplus profits after paying a like dividend on the subordinate shares," and he refers to the fact that in many cases express words are inserted to secure this result, and quotes with approval a passage out of Palmer's Company Precedents, 11th ed., pt. i., p. 814, in which it is stated: "Where preference shares are given a preference as regards capital that does not impliedly exclude them from sharing in the surplus assets in winding-up, after clearing off the whole of the paid-up capital." He gives judicial authority to Sir Francis Palmer's statement, which is in the same sense as statements in all the authorities I have already referred to.

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(1) [1909] 2 Ch. 187.
(2) Ibid. 193.
(3) [1912] 2 Ch. 571.
(4) Ibid. 580.

In *In re Fraser & Chalmers, Ld.* (1), Astbury J. gave effect to the same principle. He said (2) that the rule which he had to follow was that " all shareholders are entitled to equal treatment unless and to the extent that their rights in this respect are modified by the contract under which they hold their shares." It is true that in the later case of *Collaroy Co., Ld.* v. *Giffard* (3) Astbury J. distinguished the case then before him from *In re Fraser & Chalmers, Ld.* (1); he affirmed his decision in *In re Fraser & Chalmers, Ld.* (1), but found reasons for arriving at a different conclusion in *Collaroy Co., Ld.* v. *Giffard.* (3) He found some distinction in the terms of the contract there. Whether that distinction is satisfactory may be questioned. Personally I find myself inclined to agree with Eve J. in not being able to follow the distinction between *In re Fraser & Chalmers, Ld.* (1), and *Collaroy's* case. (3)

I have dealt with a long sequence of authorities which has indicated the touchstone to be applied by the Court in these cases. A case which lies on the other side is *In re National Telephone Co.* (4), which was decided by Sargant J. I cannot accept the decision in that case as in any way impinging upon or altering the general rule recognized by the authorities which I have discussed so far.

Therefore, looking at the authorities as a whole, I come to the conclusion that there must be in respect of this balance of surplus assets a parity between all the shareholders. I cannot find anything in the present case which either expressly or impliedly is sufficient to displace the rights which belong to the preference shareholders equally with the ordinary shareholders, and the rule of parity among shareholders must therefore prevail.

For these reasons I am of opinion that the appeal must be dismissed with costs.

Lawrence L.J. I agree that this appeal fails. It plainly appears from all the cases cited by Mr. Stamp that the

(1) [1919] 2 Ch. 114.
(2) Ibid. 120.
(3) [1928] Ch. 144.
(4) [1914] 1 Ch. 755.

question to be determined on this appeal depends upon the true construction of the memorandum and articles of the company. In the case of *Will* v. *United Lankat Plantations Co.* (1) Viscount Haldane L.C. said (2): "The point in dispute is one of construction, and construction must always depend on the terms of the particular instrument; it is only to a limited extent that other cases decided upon different documents afford any guidance. I make that observation because a good deal of authority has been cited in the course of the argument, and reference has been made to dicta of various learned judges. But in all those cases they were dealing with documents which were different from those we have to construe, and our primary guide must be the language of the documents we have before us."

Eve J. has held that according to the true construction of the memorandum and articles in the present case the property or assets remaining in the hands of the liquidator, after repaying the capital paid up on the preference and ordinary shares, is distributable amongst both preference and ordinary shareholders according to their holdings irrespective of class, and that the rights of the preference shareholders in a winding-up are not limited merely to the repayment of their capital. In my judgment that decision is right, and I entirely concur with the reasons given by the learned judge for arriving at his conclusion, which reasons I would respectfully adopt as my own.

ROMER L.J. I agree. The question that has to be determined in this case is purely one of construction of the memorandum and articles of association, and I have nothing to add to the reasons given by Eve J. for arriving at the conclusion that he did, except to say that I entirely agree with them.

I would, however, like to add this with respect to one or two of the arguments that were addressed to us by Mr. Stamp. I quite agree with him that in construing the memorandum and articles we must not approach the question with any obsession or preconceived idea as to the inherent equality between shareholders in a company; but when with an open mind we have construed the memorandum and articles, then I agree entirely with the statement made by Astbury J. in giving his judgment in *In re Fraser & Chalmers, Ld.* (1), that "all shareholders are entitled to equal treatment unless and to the extent that their rights in this respect are modified by the contract under which they hold their shares." In other words, I find myself in disagreement with a statement made by Sargant J., as he then was, in *In re National Telephone Co.* (2): "It appears to me that the weight of authority is in favour of the view that, either with regard to dividend or with regard to the rights in a winding-up, the express gift or attachment of preferential rights to preference shares, on their creation, is, prima facie, a definition of the whole of their rights in that respect, and negatives any further or other right to which, but for the specified rights, they would have been entitled."

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(1) [1914] A. C. 11.

(2) [1914] A. C. 15.

Let me take an example that I put to Mr. Stamp in the course of his argument. Supposing that you find the statement in the memorandum and articles of a company that the preference shares shall confer a right to a preferential fixed dividend of so much per cent. during the first five years of the company's existence, and nothing more is said about the rights of the preference shareholders to dividend, it would be impossible in my opinion to argue that as from the expiration of those five years the preference shares did not rank in respect of dividend pari passu with the ordinary shares. So too here, if you find that according to the true construction of the memorandum and articles the preference shareholders in a winding-up are to receive in the first place out of the surplus assets—by which I mean the assets left after discharging all the liabilities of the company—in priority to anybody else the amount which they have paid up on their shares and nothing whatever is said as to what is to be done with the balance of the surplus assets remaining after every shareholder has been repaid his capital in full, I see no reason

(1) [1919] 2 Ch. 114, 120.

(2) [1914] 1 Ch. 755, 774.

whatever why with regard to that balance as to which the articles and memorandum are silent, the preference shares should not rank pari passu with the ordinary shares.

The other observation I want to make is that, because according to the true and I might say obvious construction of the memorandum and articles here the preference shareholders, as regards dividend, are entitled to nothing more than the fixed preferential dividend expressed to be given to them, it does not in the least follow that so far as regards their rights in a winding-up they are only entitled to the privileges of preference expressly given to them in that respect. I desire to associate myself with the observation made by Farwell L.J. in *Will* v. *United Lankat Plantations Co.* (1) when dealing with a somewhat similar question to this: "To my mind the considerations affecting capital and dividend are entirely different. The preference given to capital is in the winding-up, and the preference claimed to be given to dividend here is in a going concern; and I do not think that you can reason from what will happen to capital in a winding-up to what ought to happen to dividend while the company is a going concern." To my mind the converse of that proposition is directly applicable to the present case.

For these reasons I agree that this appeal must be dismissed.

Appeal dismissed.

Solicitors: *Gibson & Weldon, for A. A. Burton & Son, Leeds.*

H. C. G.

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(1) [1912] 2 Ch. 571, 580.

C. A.

1932

LUXMOORE J.

April 20, 21;
May 6;
July 14.

C. A.

Oct. 12, 13.

FRESHWATER AND ANOTHER *v.* BULMER RAYON COMPANY, LIMITED.

[1931. F. 1276.]

Action—Judgment—Right of Action merged in Judgment—Pollution of River by Company—Business and Liabilities of Company assigned—Judgment against Assignee for Pollution—Judgment unsatisfied—Right of Action against Company—Not joint Tortfeasors.

In October, 1925, the defendant company set up a factory and began to carry on the business of artificial silk manufacturers near a river above the plaintiffs' premises. In May, 1928, the British Acetate Silk Corporation bought the goodwill of the company's business and its factory upon the terms that as from February 1, 1928, the Corporation should acquire all the company's rights and assume all its liabilities. The Corporation also agreed to discharge all debts, liabilities, contracts, engagements and obligations of the company in relation to the business and indemnify the company against all actions and claims in respect thereof. On September 27, 1928, the plaintiffs issued a writ against the Corporation for damages for pollution of the river. On October 12, 1928, their solicitors wrote to the solicitors of the Corporation asking whether the Corporation was prepared to accept responsibility for whatever damage was caused to the plaintiffs by the company, and in reply the solicitors of the Corporation wrote agreeing that for the purpose of calculating the amount of damage (if any) alleged to have been suffered by the plaintiffs, in so far as such damage was shown to have been suffered at the hands of the company, the amount of those damages could be added to those claimed against the Corporation. On October 27, 1928, the Corporation submitted to a perpetual injunction and to an order directing an inquiry as to what damage had been caused to the plaintiffs by the pollution by the Corporation and the company. In April, 1930, damages were assessed at 2650*l.* for the period from October, 1925, to February 1, 1928, and from February 1, 1928.

No specific amount was allocated for each period. The business of the Corporation having been subsequently compulsorily wound-up no part of the damages awarded was or can be paid.

On July 4, 1931, the plaintiffs issued the writ in this action for damages for pollution between October, 1925, and May, 1928. The company by their defence pleaded that the judgment against the Corporation precluded any further claim by the plaintiffs against the company, and that point of law was heard in advance of the action:—

Held, on the proper construction of the letters of October, 1928, to which the company were not parties, that the Corporation agreed to assume responsibility only for any pecuniary loss which was assessed as the measure of damages in the action against the Corporation, and the amount so found not having been paid, the company were not released from any right of action against it. The principle of merger of the right of action against the company in the judgment obtained against the Corporation was not applicable, as the company and the Corporation were not joint tortfeasors, and the action which could be brought against the one or the other was not for the same cause of action but was in respect of a similar tort committed successively by them. Therefore the judgment against the Corporation did not constitute a defence to this action.

Decision of Luxmoore J. affirmed.

ACTION.

The following statement of facts is substantially taken from the judgment of Luxmoore J. :—

The plaintiff William Frederick Freshwater is a miller and farmer, and he occupies a farm and mill called Badley Mill in the county of Suffolk. The River Gipping flows through the farm and the mill is situate on the river. The plaintiff Eva Violet Mary Freshwater is the owner of both the farm and the mill.

The Bulmer Rayon Company during the period 1925 to May, 1928, owned and occupied a factory and artificial silk works, and carried on thereon the manufacture of artificial silk. This factory was situate on the River Gipping above the plaintiffs' premises, Badley Mill. The Bulmer Rayon Company began manufacturing artificial silk in or about October, 1925. The plaintiffs allege that the Bulmer Rayon Company in the conduct of its business employed processes involving the use of substances and their discharge into the River Gipping in such a manner as to pollute the water of the river and to cause a nuisance to the plaintiffs. The plaintiffs further allege that they have suffered loss and damage by reason of these matters. For the purpose of the argument before me but for no other purpose all these allegations were admitted by the Bulmer Rayon Company.

The Bulmer Rayon Company claims that it is under no liability, because on October 17, 1929, the plaintiffs recovered judgment for damages for pollution of the River Gipping in an action which they brought against the British Acetate Silk Corporation, Ld. I will refer to this company as "the Corporation." The judgment was obtained in these circumstances. The plaintiffs on September 27, 1928, issued a writ against the Corporation alone, and by it they claimed an injunction to restrain those defendants their workmen, servants and agents from discharging or permitting to be discharged from the Corporation's factory at or near Stowmarket in the county of Suffolk into the River Gipping or its tributary streams any matter so as to pollute the waters thereof or render them unwholesome or unfit for use for watering the plaintiffs' cattle or other livestock or for operating the plaintiffs' mill or so as to cause the said waters to give off any noxious or offensive fumes gases or odours or otherwise to occasion a nuisance to the plaintiffs their family workmen and servants or their property. They also claimed damages.

It appears that on March 28, 1928, the Corporation entered into an agreement with the Bulmer Rayon Company under which the latter agreed to sell and the Corporation agreed to purchase as from February 1, 1928 (among other things), the goodwill of the Bulmer Rayon Company's business and the factory at Stowmarket. As part of the consideration for the sale the Corporation agreed to "pay, satisfy and discharge and fulfil all the debts liabilities contracts engagements and obligations of the Company (that is the Bulmer Rayon Company) whatsoever in relation to the said business, and at all times to indemnify the Company against all actions proceedings claims costs and demands in respect of such debts liabilities contracts engagements and obligations so to be paid satisfied and discharged by the Corporation." The agreement provided that completion should take place on May 31, 1928, and that until completion possession of the property should be retained by the Bulmer Rayon Company, and that in the meantime that company should carry on the said business in the same manner as theretofore and so as to maintain the same as a going concern. It also provided that the Bulmer Rayon Company should from February 1, 1928, inclusive be deemed to have been and to be carrying on the said business on behalf of the Corporation, and should account to and be indemnified by the Corporation accordingly.

On October 12, 1928, after the summons for directions in the action against the Corporation had been taken out, the plaintiffs' solicitors wrote to the solicitors for the Corporation in these terms: "Our client's claim covers a period anterior to that at which we understand your clients took over the factory at Stowmarket. We shall be obliged if you will inform us whether your clients when taking over the factory undertook the liabilities of the Bulmer Rayon Company. If they did so and are prepared to accept responsibility in these proceedings for whatever damage may be held to have been caused to our client by the Bulmer Rayon Company, there will be no necessity for any separate action against that company. If however your clients do not accept liability, it will be necessary either to add the Bulmer Rayon Company as a defendant in these proceedings or alternatively to commence a separate action against that company." The solicitors for the Corporation replied to this letter on October 25, 1928. The material part of the letter is as follows: "For the purpose of calculating the amount of damage (if any) alleged to have been suffered by the plaintiffs, our clients (i.e., the Corporation) are prepared to agree that in so far as such damage is shown to have been suffered at the hands of the Bulmer Rayon Company, the amount of these damages can be added to those claimed against our clients. This agreement however must not be construed or taken in any way to be an admission that any damage has been suffered by your client at the hands of the Bulmer Rayon Company or of our clients. Further we are instructed that your client has already had a contribution from the Bulmer Rayon Company in respect of an engine for this mill and that this has some connection with the claim your client now seeks to make against the Bulmer Rayon Company."

On December 7, 1928, the statement of claim in the action against the Corporation was delivered. Para. 1 sets out the plaintiffs' title. Para. 2 sets out the title of the defendant Corporation and states among other things that in or about the month of May, 1928, the Corporation acquired the silk works and factory from the Bulmer Rayon Company on the terms (among others) that the Corporation acquired the rights and assumed all the liabilities of the Bulmer Rayon

Company in respect of the said silk works and factory. Paras. 3 and 4 contain in effect two separate allegations: (1.) that the Bulmer Rayon Company caused pollution of the river from October, 1925, or thereabouts until May, 1928 (no more precise dates were given), and (2.) that the Corporation caused similar pollution from May, 1928, and were at the date of the action still causing pollution. Particulars of the damage caused by the pollution are set out in the statement of claim. The dates assigned in the particulars show that some of the damage claimed was due to the acts of the Bulmer Rayon Company, while the rest of the damage claimed was due to the acts of the Corporation. Obviously the plaintiffs had no cause of action against the Corporation in respect of damage suffered by reason of the acts of the Bulmer Rayon Company before February 1, 1928, and the Corporation could, to this extent and apart from the arrangement made in the letters to which I have already referred, have successfully defended the action. The Corporation did not raise the defence that it was not liable for any damage caused by the Bulmer Rayon Company, and it is I think obvious that the Corporation did not do so because of the arrangement; and also because having agreed to indemnify the Bulmer Rayon Company against its existing liabilities, the Corporation was bound to indemnify the Bulmer Rayon Company in respect of any damage caused to the plaintiffs by that company. The action proceeded on the footing that the only matter to be determined was whether the acts of pollution had in fact taken place and the items of damage had in fact been suffered. On October 17, 1929, the Corporation submitted to a perpetual injunction substantially in the terms of the writ, and to an order directing an inquiry as to what damage had been occasioned to the plaintiffs and their property by reason of the pollution by the Corporation and the Bulmer Rayon Company of the River Gipping. The order directed the Corporation to pay to the plaintiffs the amount which should be certified as the damage within one month after the date of the Master's certificate. The Corporation submitted also to an order against it to pay to the plaintiffs the taxed costs of the action down to and including that order—but the costs of the inquiry were reserved. The inquiry was made in pursuance of the order of Master Chitty, who certified, on April 2, 1930, that the damage which had been occasioned to the plaintiffs or their property by reason of the pollution by the Corporation or the Bulmer Rayon Company of the River Gipping amounted to the sum of 2650*l.* There was no separation of the items of damage as between the Corporation and the Bulmer Rayon Company. I was not informed whether anything paid by the Bulmer Rayon Company to the plaintiffs was brought into account. The certificate was filed on April 3, 1930. The plaintiffs were unable to obtain payment of the amount certified to be due to them, and on July 24, 1930, they presented a petition for the compulsory winding-up of the Corporation. This stood over from time to time to give the Corporation an opportunity of arranging its affairs, but ultimately on October 13, 1931, an order for the compulsory winding-up of the Corporation was made. It has since transpired that the assets of the Corporation are not sufficient to pay its debenture holders in full, and consequently there is nothing available for the unsecured creditors of the Corporation, in which class the plaintiffs are. The judgment of October 17, 1929, is therefore wholly unsatisfied.

N. L. C. Macaskie K.C. and *J. B. Herbert* for the plaintiffs. The claim against the defendants is a proper one, notwithstanding the judgment of October 17, 1929. The plaintiffs did not accept the liability of the Corporation in the first action for the liability of the defendants. The facts show that there was not merely a separate tort but entirely different torts and different damage. There are really two causes of action. The recovery of judgment against the Corporation does not assist the defendants: *Morgan* v. *Blyth* (1); *Goldrei, Foucard & Son* v. *Sinclair and Russian Chamber of Commerce in London.* (2) But even in the case of joint tortfeasors, judges have said they may be sued separately: see *Brinsmead* v. *Harrison.* (3) And see *Isaacs &*

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(1) [1891] 1 Ch. 337, 344, 353.

(2) [1918] 1 K. B. 180, 188, 191.

(3) (1871) L. R. 6 C. P. 584, 587; (1872) L. R. 7 C. P. 547, 553.

Sons v. *Salbstein.* (1) The points raised in the re-amended defence are no answer in law to the claim.

A. F. Topham K.C. and *A. C. Edgar* for the defendants. The question is a much wider one than that of joint tortfeasors. The rule is that where two or more persons are liable for the same cause of action, a judgment against one is a bar to an action against the other for a tort arising out of the same cause of action. The judgment of October 17, 1929, was against the Corporation, and the plaintiffs recovered judgment in that action against them, and the inquiry thereby ordered was as to damage occasioned by the Corporation or their predecessors in title to the plaintiffs' property. That judgment is a bar to this present action: *Firm of R. M. K. R. M.* v. *Firm of M. R. M. V. L.* (2) Here the tort (if any) is the same tort. If the plaintiff is awarded one set of unliquidated damages from one defendant, he cannot say, "I will get more from some one else": *Brinsmead* v. *Harrison* (3); *Parr* v. *Snell.* (4) The dissenting judgment of Bankes L.J. in *Goldrei, Foucard & Son* v. *Sinclair and Russian Chamber of Commerce in London* (5) should be considered. The only cause of action was for the tort committed by the defendant Corporation in the first action; the plaintiffs there obtained a judgment, and the matter is therefore ended, the present defendants cannot be sued for that tort. One of the earliest cases was that if there was a cause of action against two persons, an action was barred against one after a judgment for the same cause of action against another: *Brown* v. *Wootton* (6) and Popham C.J.'s remarks. The plaintiffs elected to sue the Corporation, and any rights they might have had against the present defendants are merged in the judgment they obtained in that action. The Corporation accepted liability by submitting to judgment, and the consideration for their acceptance was that the plaintiffs should not bring any action against the present defendants.

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(1) [1916] 2 K. B. 139, 151, 152.

(2) [1926] A. C. 761.

(3) L. R. 6 C. P. 584; L. R. 7 C. P. 547.

(4) [1923] 1 K. B. 1, 6, 9.

(5) [1918] 1 K. B. 180, 188.

(6) (1605) Cro. Jac. 73, 74.

N. L. C. Macaskie K.C. in reply. The facts of this case differ essentially from the facts of the cases cited by the defendants. The cause of action was never merged, but the Corporation's liability was with respect to the same subject-matter as that of the defendants in the present case. The judgment was never satisfied. And as to separate causes of action against joint tortfeasors, see *The Koursk.* (1)

Cur. adv. vult.

July 14. LUXMOORE J. This action was set down in the non-witness list in order that certain points of law might be argued and determined before the trial of the action.

The action is brought by one William Frederick Freshwater and Eva Violet Mary Freshwater, his wife, against the Bulmer Rayon Company, Ld. The writ was issued on July 4, 1931. By it the plaintiffs claim damages for the pollution of the River Gipping during a period extending from October, 1925, to May, 1928, by the discharge of effluent from a factory at or near Stowmarket in the county of Suffolk. [His Lordship read the facts as substantially set out above.] The plaintiffs are now anxious to pursue their remedy—if any still remains open to them—against the Bulmer Rayon Company. For this purpose the plaintiffs issued their writ against the Bulmer Rayon Company claiming damages for pollution of the river between the dates I have referred to, and the statement of claim contains particulars of the damage alleged which are for all practical purposes the same as those in respect of the same period contained in the statement of claim in the action against the British Acetate Silk Corporation. The Bulmer Rayon Company by its amended defence denies that it had polluted the River Gipping or caused any of the particular damage alleged in the statement of claim, and by paras. 6 and 7 set up certain legal defences. An order was made on a notice under the summons for directions whereby it was ordered that the points of law raised by paras. 6 and 7 of the amended defence of the Bulmer Rayon Company should be set down in the non-witness list for argument. The actual points raised by those paragraphs were not very clearly stated, and during the argument before me the paragraphs in question were re-amended. As re-amended the paragraphs are as follows : " 6. In the alternative the defendants say (A) that by an agreement dated the 28th day of March 1928 and made between the defendants of the one part and the British Acetate Silk Corporation Limited (hereinafter called ' the Corporation ') of the other part the Corporation which was established for the purpose of entering into such agreement amongst other objects agreed to purchase the goodwill of the business of the defendants and all their property whatsoever and wheresoever (except certain assets specifically excepted). As part of the consideration for the said sale the Corporation agreed to pay satisfy and discharge and fulfil all the debts liabilities contracts engagements and obligations of the defendants whatsoever in relation to the said business and at all times to indemnify the defendants against all actions proceedings claims costs and demands in respect of such debts liabilities contracts engagements and obligations so to be paid satisfied and discharged by the Corporation. By Clause 11 of the said agreement it was provided that possession of the property thereby agreed to be sold should be retained by the defendants until the completion of the said purchase and that in the meantime the defendants should carry on the said business in the same manner as theretofore so as to maintain the same as a going concern and should from the 1st day of February 1928 inclusive be deemed to have been and to be carrying on such business on behalf of the Corporation and should account to and be indemnified by the Corporation accordingly. (B) that in an action the title and short reference to the record whereof is 1928.—F.—No. 1433. *Freshwater* v. *The British Acetate Silk Corporation Limited* the plaintiffs sued the Corporation for the same cause of action as in the statement of claim alleged (C) that by letter dated the 12th day of October 1928 and written by the plaintiffs' solicitors to Messrs. Herbert Smith & Co. the solicitors of the Corporation the plaintiffs enquired whether the Corporation was prepared to accept responsibility in the said action for whatever damage might be held to have been caused to the plaintiffs by the defendants and stated that if the Corporation was so prepared there would be no necessity for any separate action against the defendants but that if the Corporation was not so prepared it would be necessary to proceed against the defendants in the said action or alternatively in a separate action. By a letter dated the 25th day of October 1928 written by the said Messrs. Herbert Smith & Co. to the plaintiffs' solicitors the Corporation agreed that for the purpose of calculating the amount of the damage (if any) alleged to have been suffered by the plaintiffs the amount of such damages in so far as the same were shown to have been suffered at the hands of the defendants could be added to those claimed against the Corporation (D) that on the 17th day of October 1929 the plaintiffs recovered judgment in the said action under an order whereby it was (inter alia) ordered that an enquiry should be made as to what damage had been occasioned to the plaintiffs or their property by reason of the pollution by the Corporation or their predecessors in title the defendants of the waters of the said River Gipping or its tributary streams and that the Corporation should pay to the plaintiffs the amount which should be certified (E) that the said enquiry was duly made and the said damage was subsequently certified as 2650*l.* and (F) that the said judgment still remains in force."

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(1) [1924] P. 140.

Then by para. 7 they said: "If which is denied the defendants were ever liable to the plaintiffs or either of them in respect of the said cause of action the defendants will submit that by or by reason of the acts and events alleged in para. 6 hereof the plaintiffs accepted or must be deemed to have accepted the liability of the Corporation for the acts of the defendants alleged in the statement of claim herein in substitution for and in discharge of the liability of the defendants for such acts and that the plaintiffs are thereby precluded or estopped from suing the defendants in respect thereof or (in the alternative) that the cause of action in respect of the said acts alleged in this action is the same as the cause of action in respect of the acts of the defendants alleged in the said action and in respect of which the plaintiffs recovered judgment in the said action and that the said cause of action was and is merged in the said judgment or (in the alternative) that the said cause of action in respect of all the alleged acts of the defendants which were committed on or after the 1st day of February 1928 was and is merged in the said judgment."

As I understand these paragraphs the substantial point of law to be determined is whether the plaintiffs are by reason of the circumstances under which they obtained the judgment of October 17, 1929, against the British Acetate Silk Corporation precluded from suing the Bulmer Rayon Company in respect of the acts of pollution committed by that company between the month of October, 1925, and the month of May, 1928, or at any rate between the month of October, 1925, and February 1, 1928.

In addition to this main defence the Bulmer Rayon Company claim that quite apart from the arrangement contained in the correspondence between the solicitors for the plaintiff and the company respectively any cause of action against the Bulmer Rayon Company has merged in the judgment of October 17, 1929.

Before dealing with these points of law it is, I think, essential to ascertain what was the position of the plaintiffs vis-à-vis the Corporation and the Bulmer Rayon Company immediately before the issue of the writ in the first action—assuming that the acts complained of and set out in the particulars to the statement of claim in that action had been committed. On this assumption, it is obvious that the Bulmer Rayon Company and the Corporation had each committed separate torts, and that the Bulmer Rayon Company and the Corporation could not by any possibility be said to be joint tortfeasors except with regard to the period between February 1, 1928 (the date on and from which the Bulmer Rayon Company, Ld., was to be deemed to be carrying on the works and factory on behalf of the Corporation), and the date when the Corporation took over the works and factory and carried on business thereat on its own behalf. It follows from this that—apart from any arrangement—the Corporation had at the date of the issue of the writ in the first action a good defence to the claim for damages for pollution caused before February 1, 1928, and that—on the assumption that the acts of pollution complained of had in fact been committed—the Corporation had no defence to the claim for damages caused during the period from February 1, 1928, to May, 1928, because during that period the Corporation were the principals and the Bulmer Rayon Company the agents of the Corporation in respect of the tortious acts committed. In other words the Bulmer Rayon Company and the Corporation were in law to be deemed to have been joint tortfeasors during this period. On the same assumption the Corporation had no defence to the action so far as the acts of pollution caused after May, 1928, were concerned, because the Corporation was admittedly solely responsible for such acts.

Apart from any question arising out of the arrangement it is plain that if there are two joint tortfeasors a judgment against one of them releases the other from any liability. For the purpose of this rule a principal and his agent are deemed to be joint tortfeasors although the tort complained of is committed by the agent alone; for each is responsible for the same tort. It follows that as regards acts of pollution committed by the Bulmer Rayon Company during the period when they were carrying on the works and factory as agent for the Corporation, the judgment of October 17, 1929, is a bar to any further claim against the Bulmer Rayon Company in respect of the same acts, that is, those committed between February 1, 1928, and May, 1928. This however does not apply to the acts committed by the Bulmer Rayon Company when it was carrying on the works and factory on its own behalf, that is, from October, 1925, to February 1, 1928. Apart from the indemnity given by the Corporation to the Bulmer Rayon Company under the agreement of March 28, 1928, and the arrangement made between the respective solicitors for the plaintiffs and the Corporation, it is difficult to find any ground on which it could be said that the unsatisfied judgment against the Corporation operated to discharge the Bulmer Rayon Company from liability for the tortious acts committed by it. The Corporation and the Bulmer Rayon Company were not joint tortfeasors in respect of these acts nor was the damage caused by each of them separately in any sense the same damage. The truth is each was, except during the period from February 1, 1928, to May, 1928, a separate tortfeasor in respect of the torts committed by it. Indeed I understand that the total damage certified in the first action to be due to the plaintiffs has been ascertained by adding up the separate items of damage attributable to each separate tort.

What is the position if a plaintiff sues in respect of a tort and recovers judgment for damages suffered by reason of that tort against a person who did not commit it and was not liable in law for the resulting damage ? Can he then sue the real tortfeasor ? It seems to me that the answer must depend on whether the judgment recovered has been satisfied or not. For if it has been satisfied the plaintiff cannot in law recover a second judgment in respect of the same wrong. If however the judgment has not been satisfied or is only partially satisfied, then there seems to me to be no legal ground, apart from agreement or estoppel, to prevent the plaintiff suing and recovering judgment against the actual tortfeasor so long as credit is given for anything recovered under the earlier judgment. I think this position is established by a careful consideration of such cases as *Brinsmead* v. *Harrison* (1) ; *Ex parte Drake* (2) ; *Morris* v. *Robinson* (3) ; and *Bradley & Cohn, Ld.* v. *Ramsay & Co.* (4)

There is no actual decision covering the precise case in tort, but it has been held that in a case where there is no joint contract or relation of principal and agent an unsatisfied judgment against a person not legally liable for the price of goods sold is not a bar to a subsequent action against the person in fact liable. I refer to *Isaacs & Sons* v. *Salbstein.* (5) In that case it was argued

(1) L. R. 6 C. P. 584.

(2) (1877) 5 Ch. D. 866.

(3) (1824) 3 B. & C. 196.

(4) (1912) 106 L. T. 771.

(5) [1916] 2 K. B. 139.

that a judgment recovered in default of appearance against a firm called Salbstein Brothers which remained wholly unsatisfied was a bar to a subsequent action against two individuals, H. Salbstein and his wife, neither of whom was a partner in the firm of Salbstein Brothers, on the ground that the doctrine "transit in rem judicatam" applied not only as between the plaintiff and defendant or any persons who were joint contractors with the defendant in the contract sued on but applied also although the person ultimately sued on had no relation to the person against whom the prior judgment was recovered and was not a party with him to any joint contract and was not his agent or principal; but it was pointed out in the Divisional Court by Lush J. that the doctrine that a right of action merges in a judgment recovered only applies to the case where the cause of action said to be merged is the same cause of action as that in respect of which the judgment was recovered, and that the doctrine does not mean that if a judgment is recovered in respect of the same goods against somebody the cause of action against some other person really liable is gone. In the result the defendants' argument failed, and it was held that the first judgment was no bar to the claim against the person actually liable.

It seems to me that the principle of that decision is equally applicable to a case arising in tort, for if a person injured recovers judgment against one who has not committed the tort and is not in law responsible for it there is no cause of action on which the judgment is based, and in that case it would certainly be strange if the cause of action against the actual tortfeasor should merge in the judgment obtained. If the judgment is satisfied the cause of action against the actual tortfeasor cannot be sued upon, but this I think is not because the cause of action is merged in the judgment but because double satisfaction cannot be recovered.

It is true that as between the person injured and the defendant in the first action the latter is estopped by the judgment from denying his liability, but that estoppel arises between the parties to the first action, and cannot be an estoppel between the plaintiff and the actual tortfeasor. This was clearly pointed out by Atkin J. in *Isaacs & Sons* v. *Salbstein*, where he says this (1): "I think that the estoppel which is founded upon a judgment is purely and simply an estoppel between the parties, and I am struck with the fact that in the notes to the *Duchess of Kingston's Case* in Smith's Leading Cases (2) I find no trace at all of this doctrine that is put before us—certainly before me—for the first time. Those notes in dealing with estoppel divide estoppel by judgments into two kinds, judgments in rem and judgments in personam, or more accurately inter partes, because there may be a judgment in personam as to the status of a particular person which is similar to a judgment in rem. Then, proceeding to deal with this estoppel they say (2): 'Next with regard to the judgment of a Court of record *inter partes*. . . . . The great maxim which governs [its effect] is,—*Res inter alios acta alteri nocere non debet.*' The rule laid down in the judgment of De Grey C.J. in the *Duchess of Kingston's Case* (2) is that the judgment is conclusive between the same parties. In B. N. P. 232, the rule, and the reason for it, are stated to be that 'the verdict ought to be between the same parties, because otherwise a man might be bound by a decision who had not the liberty to cross-examine; and nothing can be more contrary to natural justice, than that any one should be injured by a determination that he, *or those under whom he claims*, was not at liberty to controvert.' To the same effect is Com. Dig. tit. *Estoppel;* Co. Litt. 352; and *Gaunt* v. *Wainman* (3), where Tindal C.J. said: 'According to Co. Litt. 352a, "Every estoppel ought to be *reciprocal*, that is, to bind both parties; and this is the reason, that regularly a stranger shall neither take advantage, nor be bound by the estoppel."' It would be hard, indeed, if it were otherwise." The decision of the Divisional Court in that case was affirmed in the Court of Appeal.

On this footing and apart from the arrangement made between the solicitors for the plaintiff and the Corporation

(1) [1916] 2 K. B. 139, 144.

(2) 2 Sm. L. C. (12th ed.), pp. 754, 767, 780. (13th ed.), pp. 644, 657, 672.

(3) (1836) 3 Bing. N. C. 69, 70.

respectively by the letters to which I have referred I should be prepared to hold that the judgment of October 17, 1929, was not a bar to the present action in respect of the torts committed by the Bulmer Rayon Company before February 1, 1928.

Does the arrangement referred to alter the position? To answer this question it is necessary to consider the relationship of the parties at the time the arrangement was made and the precise terms of the arrangement itself. The plaintiffs were claiming that the Bulmer Rayon Company and the Corporation had each committed separate torts. Further they admitted that they could not make the Corporation directly liable for the separate torts of the Bulmer Rayon Company although the Corporation were under a contractual liability to indemnify the Bulmer Rayon Company in respect of any liability it might be under to the plaintiffs in respect of those torts. The plaintiffs through their solicitors in effect suggested that the Corporation should accept direct liability for the Bulmer Rayon Company's torts, pointing out that if the Corporation was unwilling to do this the alternative would be either to join the Bulmer Rayon Company as a defendant to the existing action or to begin an independent action against it. The Corporation was interested in the matter to this extent, that whether the Bulmer Rayon Company was added as a defendant to the existing action or a fresh action was begun against it, the Corporation was in the ultimate resort bound to indemnify the Bulmer Rayon Company against whatever the plaintiffs might recover against it. This was in fact the footing on which the plaintiffs' offer was made. The Corporation accepted the suggestion and did not dispute direct liability for the torts of the Bulmer Rayon Company. Indeed the Corporation ultimately submitted to the judgment, which included an inquiry as to the damages suffered by reason of the torts by the Bulmer Rayon Company. But the Bulmer Rayon Company was not a party to the arrangement nor do the plaintiffs seem to have consulted them in the matter. There is admittedly no express provision in the arrangement for the release of the liability of the Bulmer Rayon Company to the plaintiffs. Is such a provision necessarily to be implied as part of that arrangement? I think not; because it is quite consistent with the arrangement made that the parties should have intended that the cause of action against the Bulmer Rayon Company should remain enforceable in the event of the failure of the Corporation to satisfy any judgment which the plaintiffs might by reason of the arrangement recover against it in respect of the torts of the Bulmer Rayon Company. The Corporation could have no ground of complaint if the Bulmer Rayon Company was sued by the plaintiffs on account of the Corporation having failed to satisfy any sum awarded as damages for the torts of the Bulmer Rayon Company; nor could the Bulmer Rayon Company have any ground for complaint, because its position was in no way affected by reason of the arrangement. I am unable to find any release by the plaintiffs of their rights against the Bulmer Rayon Company, nor can I find any estoppel operating as between the Bulmer Rayon Company and the plaintiffs disentitling the plaintiffs to sue the Bulmer Rayon Company in respect of the acts of pollution committed before February 1, 1928—nor can I discover anything which would make it inequitable on the part of the plaintiffs, so far as the Corporation and the Bulmer Rayon Company or either of them are or is concerned, to sue the Bulmer Rayon Company for damages in respect of the torts committed by it.

In the result I hold that the matters pleaded in paras. 6 and 7 of the re-amended defence afford no defence in law to the plaintiffs' claim in this action. The defendant company must pay the costs of the proceedings for the determination of these questions.

A. R. T.

C. A.

The Bulmer Rayon Company appealed. The appeal was heard on October 12 and 13, 1932.

A. F. Topham K.C. and *A. C. Edgar* for the appellants. The Corporation, on the sale to it in May, 1928, agreed to take over the liabilities of the defendant company, and accepted responsibility for the torts of the company and agreed to indemnify the company. The tort of pollution of the river was committed by the employees of the company, and the cause of action against the company became merged in and extinguished by the judgment recovered by the plaintiffs against the Corporation. The effect of the letters of October 12 and 25, 1928, was that, in consideration of the plaintiffs agreeing not to sue the company, the Corporation took over the liabilities, and that agreement can be relied upon by the company. By the letters the Corporation took over the liabilities in relief of the company, and the fact that the company were not parties to the letters would not prevent it getting relief. The letters constitute a contract by the plaintiffs not to sue the company. While the judgment against the Corporation stands the plaintiffs have no right of action against the company. The employees of the company are liable as joint tortfeasors with the company, but if once judgment were recovered against the employees the cause of action against their joint tortfeasors, the company, has gone: *Brown* v. *Wootton.* (1) The decision in that case has been accepted in many subsequent cases. As a result of the arrangement come to by the letters the cause of action against the company became one against the Corporation, since the Corporation accepted responsibility for that very cause of action. The question is whether the judgment was recovered for the same cause of action.

[THE MASTER OF THE ROLLS. A person can elect to sue the agent or the undisclosed principal. The pollution in 1926 was no concern of the Corporation, as the company and the Corporation were not joint tortfeasors.]

The Corporation submitted to judgment in respect of a cause of action about something which every one knew had been done by the company, and judgment having been given against them for that cause of action, the cause of action has gone: *Brinsmead* v. *Harrison* (2); *Kendall* v. *Hamilton.* (3)

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(1) Cro. Jac. 73.

(2) L. R. 6 C. P. 584; L. R. 7 C. P. 547.

(3) (1879) 4 App. Cas. 504.

[*N. L. C. Macaskie K.C.* The case of *Kendall* v. *Hamilton* (1) shows that Parke J. (Lord Wensleydale) in *King* v. *Hoare* (2) thought that *Brown* v. *Wootton* (3) was a case of joint tortfeasors, and the Court agreed.]

The question is whether the decision in *Isaacs & Sons* v. *Salbstein* (4), that where the wrong person sued on a contract the right person could then sue, should be extended to an action for tort. The judgment was against the Corporation for tort committed by the company. The principle is stated clearly in that case. If a person sues an agent for an undisclosed principal and recovers judgment he cannot afterwards sue the principal even although the judgment obtained does not result in satisfaction of the debt: that is clear from the judgment given in *Firm of R. M. K. R. M.* v. *Firm of M. R. M. V. L.* (5) The plaintiffs having made a settlement with the Corporation cannot recover from the company: *Hirachand Punamchand* v. *Temple.* (6)

N. L. C. Macaskie K.C. and *J. B. Herbert* for the respondents were not called upon.

LORD HANWORTH M.R. This appeal raises an interesting point of law, which has been, as one would expect, put very clearly before the Court by Mr. Topham. The facts must be shortly stated in order to illustrate exactly what the point to be determined is. The Bulmer Rayon Company were a company who were carrying on business in close proximity to a river called Gipping, above Badley Mill in Suffolk, owned by the plaintiffs, and they started, at this site, manufacturing artificial silk in October, 1925; and it is said by the plaintiffs that in the course of their carrying on that business they polluted this river, to the injury of the plaintiffs, who bring this present action.

On March 28, 1928, an agreement was made between the Bulmer Rayon Company and a company called the British Acetate Silk Corporation, whom I shall refer to as "the

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(1) 4 App. Cas. 504.
(2) (1844) 13 M. & W. 494.
(3) Cro. Jac. 73.
(4) [1916] 2 K. B. 139.
(5) [1926] A. C. 761.
(6) [1911] 2 K. B. 330.

Corporation"; and that agreement was one under which the Corporation undertook to buy and to carry on the business hitherto carried on by the Bulmer Rayon Company. The transfer of the business under the contract was to be completed in May, 1928, and to take effect as from February 1, 1928. One of the terms of the contract was that the Corporation would be liable for the acts proved to have been committed by the Bulmer Rayon Company as from February 1, 1928. That is to say, that the Corporation took over and indemnified the Bulmer Rayon Company in respect of the acts done in the carrying on of the business for a period subsequent to February 1; and therefore the Corporation were to be wholly responsible in respect of whatever had been done during the course of a certain number of weeks by the Bulmer Rayon Corporation.

Now, an action was brought by the present plaintiffs against the Corporation, and that action was commenced by the writ of September 27, 1928. Judgment was obtained, and it was found that there had been acts of pollution done by the Corporation, and, more than that, certain letters had passed under which it was thought that a short cut could be made of the responsibilities of the Corporation to the plaintiffs; the letter written on behalf of the plaintiffs on October 12, 1928, stated: "Our client's claim covers a period anterior to that at which we understand your clients took over the factory at Stowmarket. We shall be obliged if you will inform us whether your clients, when taking over the factory, undertook the liabilities of the Bulmer Rayon Company. If they did so, and are prepared to accept responsibility in these proceedings for whatever damage may be held to be caused to our client by the Bulmer Rayon Company, there will be no necessity for any separate action against that company. If, however, your clients do not accept liability, it will be necessary either to add the Bulmer Rayon Company as a defendant in these proceedings, or, alternatively, to commence a separate action against that company." The reply on October 25 stated: "We have

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now received our client's instructions. For the purpose of calculating the amount of damage (if any) alleged to have been suffered by the plaintiffs, our clients (i.e., the Corporation) are prepared to agree that in so far as such damage is shown to have been suffered at the hands of the Bulmer Rayon Company, the amount of these damages can be added to those claimed against our clients. This agreement, however, must not be construed or taken in any way to be an admission that any damage has been suffered by your client at the hands of the Bulmer Rayon Company or of our clients."

Upon the two letters of October 12 and 25, 1928, it appears, on a reasonable construction, that the plaintiffs sought to ascertain whether the defendants would accept responsibility in that action for whatever damage may be held to have been caused. Now, " accept responsibility for whatever damage " must mean the amount ascertained and paid. The reply, I think, makes that plain : " For the purpose of calculating the amount of the damage, if any, alleged to have been suffered by the plaintiffs." " Calculating the amount of the damage " means calculation in terms of pounds shillings and pence, and when you throw in the word " responsibility " in the previous letter, it means responsibility for the pounds shillings and pence which are the measure of the damage suffered by the plaintiffs.

In the course of the judgment which was obtained in that action on October 17, 1929, it was ordered that an inquiry should be held as to " what damage has been occasioned to the plaintiffs or their property by reason of the pollution by the defendants, or their predecessors in title the Bulmer Rayon Company, Ld., of the waters of the said rivers or streams." Ultimately the inquiry was held, and a sum was ascertained in respect of both periods, that is to say (1.) the period from 1925 down to February 1, 1928, and (2.) the period from February 1, 1928, down to the date when the damages were ascertained. Unfortunately, after that ascertainment of damages, the Corporation got into difficulties, and a compulsory winding-up was made, with the result that in the course of the winding-up it was found that the

Corporation were quite unable to pay any part of that quantum of damages so ascertained. An action has now been commenced by the same plaintiffs against the Bulmer Rayon Company in respect of the pollution from 1925 caused by that company. That action was commenced by a writ of July 4, 1931, and the Bulmer Rayon Company have put in a defence which now, in its re-amended form, contains paras. 6 and 7, and it is said that those paragraphs afford a complete defence to the action now brought against the Bulmer Rayon Company. Those paragraphs allege that there was an agreement whereby the Bulmer Rayon Company sold its business to the Corporation, and the Corporation took over the liabilities of the Bulmer Rayon Company and agreed to indemnify them; and, further, that by the two letters of October 12 and 25, 1928, there was an agreement that there should be an ascertainment of the damages in the course of the previous action; and, further, that the damages were subsequently certified at 2650*l.*; and that the judgment remained in force, although not satisfied; and therefore, it is said, there can be no further claim made by the plaintiffs against the Bulmer Rayon Company, as they ought to be content with the fact that they had a judgment for 2650*l.* against the Corporation, although that judgment was unfruitful and would not produce one penny of damages to the plaintiffs.

Inasmuch as a point of law arose from those paragraphs, it was put down for argument in advance of the action under Order xxv. It was said on that point of law there ought to be judgment entered for the defendant. The matter came before Luxmoore J., who decided that those paragraphs did not afford a conclusive defence to the defendant company, and from that judgment an appeal is taken to this Court.

Mr. Topham has presented his argument in two forms. First, he says that the letters of October, 1928, amount to a release of the Bulmer Rayon Company, and afford a discharge to them. It will have been observed at once that the letters passed between the plaintiffs and the

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Corporation, and that the Bulmer Rayon Company were not a party to them at all. But it is claimed that, on a proper construction, the letters work a release in favour of the Bulmer Rayon Company, and that, although there has been no payment, no satisfaction, of the sum which was found to be due from the Bulmer Rayon Company. I cannot accept that argument, or so read the letters. Taken at their full meaning they seem to indicate that the Corporation would be responsible for payment of a debt due from the Bulmer Rayon Company. But the Corporation did not pay. The letters in themselves were not an accord and satisfaction to the plaintiffs. If accord and satisfaction were pleaded it would have to be shown, not merely that it was the accord by means of the letters, but that there was in fact a satisfaction; and it is only where a substituted agreement is accepted in accord and satisfaction that the performance of the terms of the accord are no longer required. But upon the face of these letters it seems quite plain that they were in themselves not to be treated as an accord and satisfaction, but that there was to be a means whereby the satisfaction should be obtained by the payment of the sum which was to be found due.

Therefore, I do not find that what happened between the plaintiffs and the Corporation worked a release in favour of the Bulmer Rayon Company, who were no parties to the matter at all. The case is close to, and is dealt with in, the case of *Isaacs & Sons* v. *Salbstein* (1), in which Atkin J., as he then was, points out the distinction; and that distinction shows that although these letters were dealing with the same matter, there was an independent liability in respect of different periods, and it cannot be now claimed by the Bulmer Rayon Company that something they did with a third party, which is the Corporation, has prevented—or satisfied—the plaintiffs from dealing with the tort committed by the Bulmer Rayon Company at a time when they were working the mill, and at a time when the Corporation were not on the premises at all.

(1) [1916] 2 K. B. 139.

But secondly, it is said the letters mean that the Corporation would be liable for any cause of action against the Bulmer Rayon Company, and, hence, that any right against the Bulmer Rayon Company has been merged, on the principle of the doctrine which is illustrated in *Brinsmead* v. *Harrison* (1), and which is there shortly stated by James Shaw Willes J., where he says that, as Lord Wensleydale decided in *King* v. *Hoare* (2), "it [is] quite clear that, 'if two commit a joint tort, the judgment against one is, of itself, without execution, a sufficient bar to an action against the other for the same cause.'" In that same case, in the Exchequer Chamber (3), Blackburn J. says: "The question raised upon this record is whether the claim of the plaintiff against two joint wrong-doers is put an end to by a judgment recovered in an action against one of them without shewing that that judgment has been satisfied. I apprehend that it is, on the ground that transit in rem judicatam, or upon the general principle of convenience which is expressed in the maxim 'Interest reipublicæ ut sit finis litium.' Is it for the general interest that, having once established and made certain his right by having obtained a judgment against one of several joint wrong-doers, a plaintiff should be allowed to bring a multiplicity of actions in respect of the same wrong?" Kelly C.B., going back to *Brown* v. *Wootton* (4), on which this principle was founded, quoted the judgment of Popham C.J. that: "If one hath judgment to recover in trespass against one, and damages are certain, *although he be not satisfied*, yet he shall not have a new action for this trespass." Now, one has no reason to doubt, or to throw any uncertainty, upon that principle. Lord Wensleydale in *King* v. *Hoare* (5) says: "Where judgment has been obtained for a debt, as well as a tort, the right given by the record merges the inferior remedy by action for the *same debt or tort* against another party." That is the principle. Let me see if it applies to the present case. Were

(1) L. R. 6 C. P. 584, 586.
(2) 13 M. & W. 494, 504.
(3) L. R. 7 C. P. 547, 553.
(4) Cro. Jac. 73.
(5) 13 M. & W. 494, 506.

the Corporation and the Bulmer Rayon Company joint tortfeasors? Was the tort of the pollution of the river committed by them? Was it one and the same tort? The answer is plain "No." As Mr. Topham admitted, the tort of pollution is one that is repeated. It may be committed day by day, or month by month, and each act of pollution gives rise to a separate cause of action and claim for damages. This means that on each day when pollution was caused by the Bulmer Rayon Company a cause of action arose in favour of the plaintiffs. Successively, and later on, when the working of the mill passed to the Corporation acts of pollution were committed by it, for which a cause of action arose to the plaintiffs for damages committed by the Corporation. But an examination of the time at which these acts were committed reveals clearly that the Bulmer Rayon Company and the Corporation were not joint tortfeasors, but that they successively committed torts; and the action that can be brought by the plaintiffs against the one or the other is not for the same cause of action, but is for a similar tort committed successively by them in sequence of time.

What then is the claim that arose in the first action on the letters as against the Corporation? It was: that although the Corporation were not joint tortfeasors, and had not committed any pollution anterior to February 1, 1928, yet by the terms of an agreement reached by the letters they agreed that they would pay the sum, if any, found to be due to the plaintiffs in respect of the pollution caused to the plaintiffs by the Bulmer Rayon Company. That is to say, they agreed with the plaintiffs that by contract made with them they would be responsible in damages for tortious acts committed by third parties. To such a relation the doctrine that the tort passes in rem judicatam, or that you cannot have another action, does not apply. In order to make it applicable it must be shown that whether the action is brought against one, or two, it is for the same cause of action. Here I think an examination of the relation of the parties makes it quite plain that the action against the Corporation was, so far as the claim was commenced against the Corporation, for a tort committed by the Corporation;

and so far as there was any claim for damages in respect of the anterior tort committed by the Bulmer Rayon Company it was a liability in contract based upon the letters, that the Corporation would take over a responsibility, the amount of which was to be measured by the damage suffered by the plaintiffs. But to such a contract, the doctrine now suggested does not apply, and it would be necessary to show, not merely that the contract had been made, but also that it had been fulfilled; and it has not been fulfilled.

If payment had been made of the sum found to be due it would then have been possible for the defendant, the Bulmer Rayon Company, to say: "You have already received payment and satisfaction for the injury you now complain of against us." But inasmuch as satisfaction has not been made, no such plea is available; and the short answer, therefore, to the present suggestion is that the matters pleaded in these paragraphs do not afford an answer to the claim now made. It is one which is independent of, and has not been merged in, the judgment given against the Corporation.

The learned judge has dealt with the case on the basis that, as from February 1, 1928, the torts have been merged in the judgment, and I desire to say nothing about that. Some difficulties may arise, or might arise, in considering how the doctrine of principal and agent could apply to the period from February 1, 1928. That is not the point that we have to consider. There is no cross-appeal, and all we need say is that we agree with the learned judge in the view that he has taken.

For these reasons the appeal fails, and must be dismissed with costs.

LAWRENCE L.J. Mr. Topham has taken two distinct points in support of this appeal. In the first place, he relies upon an agreement alleged to have been come to by letters passing in October, 1928, between the plaintiffs and the Corporation, whereby the plaintiffs agreed to release the defendants from liability in respect of the torts committed by them before February, 1928, in consideration of the Corporation's accepting liability in respect of those torts. In

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my judgment, it is unnecessary to consider whether, if such an agreement had been proved, the defendants, who were no parties to it, could rely upon it as a defence to the present action, because, in my opinion, the learned judge was right in holding that the defendants have failed to establish any agreement to release them from their liability in the event of the Corporation failing to pay the amount of damage which the plaintiffs had sustained.

The second point made by Mr. Topham is that any claim against the appellants in respect of the torts committed by them before February, 1928, became extinguished and merged because of the judgment obtained by the plaintiffs against the Corporation, even although the judgment was not satisfied. In support of that proposition Mr. Topham cited *Brown* v. *Wootton* (1) and other well known, more recent, cases, which establish the undisputed proposition that if a judgment is obtained against one person, a second action cannot be brought against another person in respect of the same cause of action. The short answer to this second point is that the plaintiffs had no cause of action against the Corporation in respect of the torts committed by the appellants, and that, therefore, the cause of action in the present proceedings, against the appellants, cannot be, and is not, the same cause of action as that which formed the subject-matter of the former action against the Corporation.

The fact that the Corporation agreed to become liable for the amount of any damages sustained by the plaintiffs owing to the torts of the appellants may have given the plaintiffs a right of action against that Corporation, but that right is not the cause of action which is alleged in the present action against the appellants.

The principle is well stated by Lush J. in the case of *Isaacs & Sons* v. *Salbstein.* (2) That was a case of contract, but the principle applies equally to a case like the present. The learned judge says: " There is, however, no foundation whatever for the contention that because A. recovers a judgment against B., who in truth never was a party to the contract at all, he cannot afterwards recover judgment on that contract against C., who was the real contracting party. Where judgment is recovered on a simple contract, that contract no doubt merges in the contract of higher degree which is evidenced by the judgment and which is a contract of record. But there is no ground for saying that a contract between A. and B., although it is a contract of record, merges a contract between A. and Z. They are two different contracts and therefore give rise to two different causes of action. For these reasons I think that we cannot extend the principle laid down in *King* v. *Hoare* (1) and *Kendall* v. *Hamilton* (2) to a case like the present, which bears no real resemblance to it." I agree, therefore, that the appeal should be dismissed.

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(1) Cro. Jac. 73.

(2) [1916] 2 K. B. 139, 143.

Romer L.J. I agree. In regard to the first point taken by Mr. Topham, I do not desire to add anything to what has already been said.

With regard to the second point, I only desire to add this, that the judgment which was obtained against the Corporation was not founded upon the cause of action which the plaintiffs had against the company. It was a judgment submitted to by the defendants in that action, but it was either a judgment in respect of which there was no cause of action at all, or it was a judgment founded upon a cause of action supposed to exist by reason of a liability undertaken by the defendants in that action under and by virtue of the letters that passed between the parties in the month of October, 1928. But to such a judgment the principle applied in *King* v. *Hoare* (1), *Brinsmead* v. *Harrison* (3), and similar cases have no application whatsoever.

For these reasons, I agree that this appeal fails, and the appeal must be dismissed.

Appeal dismissed.

Solicitors for appellants: *Clarke & Co.*

Solicitors for respondents: *Morris, Ward-Jones, Kennett & Co.*

G. P. L.

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(1) 13 M. & W. 494.

(2) 4 App. Cas. 504.

(3) L. R. 6 C. P. 584; L. R. 7 C. P. 547.

LUXMOORE J.

1932

March 11; April 6, 7; July 28.

BRADSTREETS BRITISH, LIMITED *v.* HAROLD MITCHELL AND CARAPANAYOTI AND COMPANY, LIMITED.

[1931. B. 5389.]

Contract—Private Inquiry Agency—Confidential Information—Condition as to Secrecy—Indemnity for Loss or Damage arising from Breach of Condition by Subscriber—Disclosure—Action for Libel against Agency—Claim against Subscriber for Indemnity and Damages—Public Policy.

The plaintiffs, a private inquiry agency, carried on the business of providing to approved subscribers confidential reports on companies, firms and persons engaged in trade. The terms upon which the reports were issued were (inter alia) that all statements were strictly confidential, and that every subscriber should indemnify the plaintiffs against any loss or damage they might suffer from the breach by the subscriber of any of the conditions of the contract.

The defendant company, an approved subscriber, through its managing director, requested the plaintiffs to furnish information regarding the X. Company for whom they were agents. The report, being of an unfavourable nature, was communicated by the defendant company to their own solicitors. The defendant M., a director of the defendant company, with the approval of its managing director, applied for and was furnished with similar information regarding the X. Company, and on the same terms and conditions. M. at once informed the managing director of the defendant company of its contents.

The matter having been brought to the plaintiffs' notice by the company reported on, both defendants at the request of the plaintiffs returned the unfavourable reports.

The plaintiffs, an action for libel having been brought against them in the King's Bench Division, commenced proceedings against both defendants for an injunction to restrain disclosure of the unfavourable reports which had been furnished, and a declaration that they were liable to indemnify the plaintiffs against any loss or damage arising from this disclosure. They also claimed damages:—

Held, on the evidence, that the defendant company did not disclose the report to any person other than its own solicitors and that this did not constitute a breach of contract with the plaintiffs within the meaning of the agreement; also that the defendant M. became a subscriber to the plaintiffs' confidental reports for the purpose of obtaining a report on the X. Company and communicating the result to the managing director of the defendant company. Further, that neither M. nor the managing director of the defendant company was acting as the agent of the defendant company and that no breach of contract committed by M. was induced by the defendant company. The action against the defendant company therefore failed.

Held also, that the agreement entered into by M. not to disclose the confidential information furnished to him and to indemnify the plaintiffs for any loss or damage which they might suffer from a breach by a subscriber of the conditions upon which reports were furnished, was not void as being against public policy.

Held further, that the disclosure by the defendant M., although a breach of this contract, did not create the liability of the plaintiffs to be sued for libel; this liability did not arise directly or indirectly out of any act of the defendant M. and was not therefore within the scope of the express indemnity contained in the plaintiffs' agreement with M. The only liability for damages, therefore, resulted from M.'s own breach of contract, and that in the circumstances such damages were merely nominal.

Weld-Blundell v. *Stephens* [1919] 1 K. B. 520; [1920] A. C. 956, 997 followed.

ACTION.

The following statement of facts is substantially taken from the judgment of the learned judge :—

The plaintiff company was at all material times carrying on, and still carries on, the business of a mercantile inquiry agency, the course of that business being to furnish reports on the financial stability or otherwise of companies, persons and firms engaged in trade. The reports are furnished in confidence to persons who are accepted by the plaintiff company as subscribers for a series of reports at an inclusive fee varying in amount according to the number of reports required. The plaintiff company does not accept subscribers indiscriminately, and no person or company can become a subscriber unless and until approved by the plaintiff company. Each applicant for acceptance is required to sign a standard application form, and if the application is accepted the conditions which are printed on the application form constitute the contract between the plaintiff company and the subscriber. The material terms are contained in clauses 2, 3, 4 and 8, which I will read :—

"(2.) That all information whatsoever furnished by the company or by any of its officers, employees or agents to the subscriber is supplied in strict confidence for the exclusive use of the latter in his business. The subscriber undertakes that in no circumstances will he reveal either the nature of the information or the fact that it has been supplied by the company to any party directly or indirectly other than a person in his employ at the time in his business, whose duty it is to receive such information as the subscriber's representative or otherwise on his behalf.

(3.) That the subscriber will neither ask for information for the use of other parties, nor wilfully or negligently suffer this to be done by any other person.

(4.) That the company, while using every endeavour to ensure accuracy, does not guarantee the correctness of all or any of the information contained in its reports.

(8.) That the subscriber shall indemnify the company and its officers, agents and employees in respect of any loss or damage whatsoever which it or they may suffer or incur directly or indirectly from the breach by the subscriber or by any of his employees or agents or any other party through or by him of any of these conditions. In the event of such breach the company may cancel the subscription without any re-imbursement in respect thereof."

Each subscriber is supplied with a book of inquiry forms, and if he wishes to inquire about a particular person, firm or company he fills in one of these forms and sends it to the plaintiff company.

The defendant company carries on business in England for the sale of products coming from the Sudan, and have for some time past been, and still are, the sole agents for a company named in the statement of claim, but which, for obvious reasons, was referred to in the conduct of the case before me as "X. and Company." I will continue so to refer to it.

At all times material to this action, the defendant company was a subscriber to the plaintiff company. On March 4, 1931, the defendant company signed and sent to the plaintiff company a form in these words: "We desire to renew our subscription with you and shall be glad if you will accordingly supply us—subject to the conditions of your service (see overleaf) with a book of 25 enquiry forms at your current tariff rate, for which we enclose our cheque value 3*l*. 3*s*." On the back of the form are printed the conditions of the service to which I have already referred.

The defendant company was accepted by the plaintiff company as a subscriber on the basis that the conditions on the application form constituted the contract between the plaintiff and defendant company. Apparently the defendant company had experienced difficulty in obtaining contracts in its capacity as agent for X. and Company, and, rightly or wrongly, it attributed the want of success to the fact that unfavourable reports were current as to the commercial standing of X. and Company. On November 1, 1931, the defendant company sent to the plaintiff company an inquiry form duly filled in requiring information concerning the responsibility, credit, character and reputation of X. and Company. On November 3, 1931, the plaintiff company sent a reply to this inquiry to the defendant company. The reply was of an unfavourable character. I need not refer to it any further. Apparently the defendant company's solicitors were consulted with regard to it but no steps were then taken. The result of the consultation was communicated by Mr. Carapanayoti, the managing director of the defendant company, to his co-director, the defendant Mitchell. Mitchell, though a director, has only one preference share in the defendant company and receives a salary of 200*l.* per annum for his services. He was, and is, according to his own evidence, without means apart from this salary. After this communication the defendant Mitchell applied to the plaintiff company to become a subscriber to its service. His application was made by a letter dated November 10, 1931, in these terms: "I shall be obliged if you will be good enough to let me have particulars of your various services, with respective literature, if any. By the same opportunity, please let me have particulars of subscription to obtain credit reports regarding the standing of my clients and correspondents in this country and abroad." This letter was written on paper specially printed for the purpose with the heading: "Harold Mitchell, General Merchant, 118 Chittys Lane, Chadwell Heath, Essex." It was not the fact that Mitchell was carrying on the business of a general merchant or indeed any other business on his own account; nor had he any clients or correspondents of his own in this country or abroad as represented in the letter. The plaintiff company sent to Mitchell in due course one of its forms applying for acceptance as a subscriber which he filled in and returned to the plaintiff company. On November 17, 1931, the plaintiff company wrote to Mitchell a letter which, so far as material, is in these terms: "We find that we have no information on our records regarding your goodself, and as we do not accept subscriptions from firms whose status is unknown to us, we are taking the liberty of enclosing herewith a personal statement form, which we would ask you to complete and return at your early convenience."

Mitchell replied on November 18, 1931: "In answer to your letter of yesterday, I have been employed by the firm of Carapanayoti & Company Limited, 29 Mincing Lane, London, E.C. 3, for the last twelve years and at the present time I am an active director of the firm. I am now organising a business on my own account, and for the present, this is done from my private address. For references you may apply to:—Messrs. Carapanayoti & Co., Ltd., 29 Mincing Lane, E.C. 3, Messrs. C. M. Coutrie & Co., 57 Mincing Lane, E.C. 3." The statement that Mitchell was organizing a business on his own account was untrue.

The plaintiff company accepted Mitchell as a subscriber and sent him the necessary forms in accordance with his application. On November 21, 1931, Mitchell sent to the plaintiff company one of the forms asking for information with regard to the responsibility, credit, character and reputation of X. & Company. On November 23, 1931, the plaintiff company sent to Mitchell a report about X. & Company, which is in precisely the same terms as the report sent by the plaintiff company to the defendant company. Having received it, Mitchell communicated the report to his co-director, Carapanayoti, who went to the same firm of solicitors as had been consulted on behalf of the defendant company, and he instructed them on behalf of X. & Company. Obviously, the whole proceeding was engineered so as to avoid the incurring by the defendant company of any liability for breach of its contract with the plaintiff company; Mitchell as a man of straw being ready and willing to incur the risk personally. As the result of this communication the solicitors for X. & Company wrote to the plaintiff company on November 24, 1931, as follows: "Our clients, Messrs. [X. & Company of . . . . and Mr. X.] its managing director, have for many months past been considerably mystified by unexpected and unexplained difficulties encountered by them in dealing with customers abroad, and particularly by the sudden failure at a late date in the negotiations of some important business in New York as a result, as the customers said of 'bad reports.' Our clients have as a result made it their business to find what reports with regard to their credit have been circulated by banks and concerns such as your own, and now learn the contents of a so-called 'Credit Report,' which has no doubt been issued by your company and its associated companies to a number of their subscribers purporting to relate to the financial stability and credit of the company, its directors, and other persons. The statements contained in this report are almost without any exception entirely inaccurate, defamatory, and malicious. We are instructed now to inform you that our clients have undoubtedly suffered considerable damage by reason of the publication referred to, and are compelled to institute proceedings to re-establish their credit [and] reputation and to recover damages in the absence of some adequate adjustment of the matter being promptly come to. The primary object of this letter is to inquire whether you are prepared to give an immediate undertaking not to repeat or circulate anything in the nature of the statements contained in the document referred to or any other inaccurate information as to our clients pending the trial of the proceedings we propose to institute. If you are not we shall be compelled to apply to the Court for an injunction." The plaintiff company wrote at once to the defendant company withdrawing the report sent on November 3, 1931, about X. & Company, and asking for its return. The plaintiff company also asked for an assurance that the contents of the report had not been disclosed by the defendant company. A similar letter with regard to the report of November 23, 1931, was also sent to the defendant Mitchell. On November 27, 1931, the defendant company and Mitchell respectively returned the reports sent by the plaintiff company. Neither the defendant company nor Mitchell gave any reply to the inquiry about disclosure. It appears that a photostatic copy of the report to Mitchell was made and retained.

On November 27, 1931, the solicitors for the plaintiff company wrote to the solicitors for X. & Company in these terms: " With reference to your letter of the 24th instant, addressed to Messrs. Bradstreets British, Ltd., we shall be glad to know whether it is definitely alleged that our clients have issued reports which are defamatory of [X. & Company], together with the date of the reports, the persons to whom the reports were issued, and the nature of the reports issued. In view of your letter our clients readily undertake not to report upon [X. & Company] for the time being."

On November 30, 1931, a writ was issued in the King's Bench Division by X. & Company against the plaintiff company claiming damages for libel. In that action, the plaintiff company has admitted the libel and has paid into Court a sum which it claims is sufficient to cover any damage suffered by X. & Company. On December 3, 1931, the plaintiff company issued the writ in this action against the defendant company and Mitchell claiming: (1.) an injunction to restrain the disclosure or communication to any person or company of the report of November 23, 1931—namely, the report to Mitchell, or of the report of November 3, 1931—namely, the report to the defendant company, and also the disclosure of the fact that the plaintiff company supplied such reports; (2.) a declaration that the defendants are respectively liable to indemnify the plaintiff company against all loss or damage which the plaintiff company might suffer or incur directly or indirectly by the disclosure of the reports: and (3.) damages for breach of contract.

W. F. Swords K.C. and *A. Guest Mathews* for the plaintiffs.

H. J. Wallington and *J. E. Rolo* for the defendants. Whatever the defendant Mitchell may have done in breach of the contract with the plaintiff company, clauses 2 and 8 are against public policy and therefore void. The decision in *W. H. Smith & Son* v. *Clinton & Harris* (1) on this point is, it is submitted, conclusive. The case of *Weld-Blundell* v. *Stephens* (2) is really no authority for the argument on the question of an express or implied indemnity, and does not on this point touch on the question raised in *W. H. Smith & Son* v. *Clinton & Harris.* (1)

[LUXMOORE J. referred to *Burrows* v. *Rhodes & Jameson.* (3)]

The law is always desirous to scrutinize carefully contracts which may involve questions of public policy. Take the analogy of contracts in restraint of trade, there the presence of the element of public policy is always considered. A good contract may be bad in law because contrary to public policy. In the particular instance now before the Court, the contract leaves the plaintiffs free for their own profit to libel anybody wilfully. It is submitted that the plaintiffs are precluded from obtaining any relief in the way of damages.

It is alleged that the defendant company induced the defendant Mitchell to break his contract with the plaintiffs; it must be remembered that the defendant company owed a duty to their employers X. & Company, and no evidence is shown that they acted with malice towards the plaintiffs: *Glamorgan Coal Co.* v. *South Wales Miners' Federation.* (4) It is submitted that so far as the defendant company is concerned, no evidence of breach of contract has been shown, and with regard to the defendant Mitchell there has been no disclosure which would injure the plaintiffs or entitle them to damages.

W. F. Swords K.C. in reply. With regard to clause 8 of the plaintiffs' form of contract with both defendants, the condition (clause 8) as to indemnity for breach may relate to tortious and non-tortious acts. As to the foundations of

(1) (1908) 99 L. T. 840.

(2) [1919] 1 K. B. 520.

(3) [1899] 1 Q. B. 816.

(4) [1903] 2 K. B. 545, 569, 570, 573, 577.

the rule, whether indemnity for a tortious act can be enforced, or not, see *Merryweather* v. *Nixan* (1); *Adamson* v. *Jarvis* (2); *Betts* v. *Gibbins* (3); *Palmer* v. *Wick and Pulteneytown Steam Shipping Co.* (4); *Burrows* v. *Rhodes* (5); *Shackell* v. *Rosier* (6); *Weld-Blundell* v. *Stephens* (7); *James* v. *British General Insurance Co.* (8), and the remarks of Lord Sumner in *Weld-Blundell* v. *Stephens* in the House of Lords. (9) The case of *W. H. Smith & Son* v. *Clinton & Harris* (10) is really no authority in the present case, but, if it is, it is in my favour.

The plaintiffs are entitled to recover damages, which are the necessary consequence of the defendants disclosing the contents of this report.

[*H. J. Wallington* dealt with the new authorities cited in reply.]

Cur. adv. vult.

July 28. LUXMOORE J. I am satisfied on the evidence that the defendant company did not in fact disclose the report of November 3, 1931, to any person other than its solicitors for the purpose of obtaining advice as to the position of the defendant company. I am also satisfied by that evidence that as the result of a suggestion on the part of Mitchell and an arrangement between Mitchell and Carapanayoti, the former became a subscriber to the plaintiff company's service and that he did so for the sole purpose of obtaining a report as to X. & Company, and of disclosing that report to that company. There is no sufficient evidence to prove that either Mitchell or Carapanayoti, in anything that was done for the purpose of obtaining the report of November 23, or with regard to its disclosure to X. & Company, was acting as the agent of the defendant company or in any way on its behalf. It is therefore impossible for me to hold that any breach of contract

(1) (1799) 8 T. R. 186.
(2) (1827) 4 Bing. 66, 73.
(3) (1834) 2 A. & E. 57.
(4) [1894] A. C. 318, 324.
(5) [1899] 1 Q. B. 816, 832.
(6) (1836) 2 Bing. N. C. 634, 644.
(7) [1919] 1 K. B. 520, 535.
(8) [1927] 2 K. B. 311.
(9) [1920] A. C. 956, 978.
(10) 99 L. T. 840, 841.

committed by Mitchell was induced by any act of the defendant company. In those circumstances the action against the defendant company must fail. The disclosure of the report of November 3, 1931, to the solicitors for the defendant company did not in my judgment constitute any breach by the defendant company of its contract with the plaintiff company within the true meaning of that contract.

The defendant Mitchell has undoubtedly committed a breach of his contract with the plaintiff company. It is argued on his behalf that he is not liable, because the contract is wholly void as being contrary to public policy. The attack is founded on the provisions of conditions 2, 3, 4 and 8, which I have already read. The argument relied on to support the attack is that the fundamental element in the contract is the desire on the part of the plaintiff company to protect itself against the risk of actions for libel resulting from reports made and issued by it to subscribers, and that the contract in substance enables the plaintiff company to commit a misdemeanour with impunity, because the contract furnishes a complete indemnity against the consequences of the libel. The case of *W. H. Smith & Son* v. *Clinton & Harris* (1) was relied upon. In that case the defendants gave to W. H. Smith & Son, who were printing and publishing a paper for them, an undertaking that they would indemnify W. H. Smith & Son against any claims whatever that might be made against them in respect of any libel that might appear in the paper. A libel was inserted in the paper with the knowledge of the staff of W. H. Smith & Son. An action was brought against them in respect of the libel, and they compromised the action by payment of a sum of money and the costs of the action. W. H. Smith & Son sued the defendants on the undertaking to indemnify, and it was held in that action that the undertaking could not be enforced in law. Lord Coleridge said: "To print or publish a libel is an illegal act. Every one who prints or publishes a libel or authorises its printing or publishing by his agent is individually and personally

(1) 99 L. T. 840, 841.

committing an illegal act. . . . . To indemnify against publishing a libel is to indemnify against doing a wrongful and illegal act. . . . . This, then, being an action brought by one party who has committed a wrongful and illegal act against another party who has committed the same wrongful and illegal act, to indemnify the one party in respect of the wrongful or illegal act committed by both, I am of opinion that such a contract cannot be enforced by law." I do not think this decision really affects the present case. The contract between Mitchell and the plaintiff company, as I read it, is not to indemnify the plaintiff company against the result of a libel published by Mitchell; it is a contract by Mitchell not to disclose information to be supplied by the plaintiff company, with a provision for indemnity in respect of any loss or damage which may be suffered or incurred directly or indirectly from the breach of the contract not to disclose.

I think the case is really covered by the decision in *Weld-Blundell* v. *Stephens.* (1) In that case the plaintiff, Weld-Blundell, employed the defendant Stephens, who was a chartered accountant, to look into the affairs of a company in which Weld-Blundell was interested. His letter of instructions contained libellous statements relating to certain officers of the company named Lowe and Comins. Stephens handed this letter to his partner, who negligently left it at the company's office. The manager of the company found it, read it, and communicated its contents to Lowe and Comins. These persons sued Weld-Blundell for the libel contained in the letter and recovered damages against him, the jury in each case finding that Weld-Blundell was actuated by malice. Weld-Blundell then sued Stephens for damages for breach of an implied duty to keep secret the letter of instructions. The jury in that action found that it was the duty of Stephens to keep the letter secret, that he had neglected this duty, and that the action of libel and the damages recovered therein was the natural consequence of his negligence. Darling J. held that the contract between the parties

(1) [1919] 1 K. B. 520, 527, 528, 532, 533, 534, 547.

did not contain any implied term to keep the letter secret and that the defendant had committed no breach of duty towards Weld-Blundell. The Court of Appeal reversed this decision. It was argued on behalf of Stephens in the Court of Appeal that, assuming there was an agreement to keep the libels secret, such an agreement would be against public policy and void.

The Court unanimously refused to accept this argument. Bankes L.J. said : " Mr. Hogg contended that for the purpose of considering the respondent's duty in the matter, the appellant's letter must be treated as a criminal libel, and the appellant himself as having been guilty of a crime, and that no contract to conceal a crime could be lawful. In the first place I do not agree that a contract not to disclose the fact that a crime has been committed is necessarily either illegal or against public policy, and I need only refer to the instance I have already mentioned of a solicitor employed to defend a prisoner to whom the prisoner admits that he has committed the crime with which he stands charged. In the second place I do not think that the respondent is entitled to treat the appellant as a person who has committed a crime by writing and publishing the libels in question. The parties libelled might possibly have taken criminal proceedings, but they did not do so. They preferred to treat the letter as a civil wrong. If the appellant had been indicted it does not at all follow that he would have been convicted ; and unless and until he is convicted he is in my opinion just as much entitled to say that he is innocent of the crime of libel as he was entitled to say, up to the time when a jury found that he had been actuated by express malice, that he had committed no civil wrong." He proceeds a little later on : " No direct authority upon this branch of the case appears to exist. In the case of *Saunders* v. *Seyd & Kelly's Credit Index Co.* (1) Lindley L.J. appears to have considered that a contract might lawfully be made not to disclose the contents of a defamatory publication, and contracts of that kind are habitually made between trade societies and their customers with reference to the information supplied as to the credit or antecedents of persons with whom the customers may be concerned in business. It is not suggested that the publication to the respondent caused any special damage to the persons who ultimately brought actions against the appellant. The contract was one which in no sense encouraged the committing of any wrong. On the contrary its effect must necessarily be to reduce any injury resulting from the wrong already done to a minimum, and to render it unlikely that any breach of the peace could result from the wrong having been committed. Under these circumstances I do not myself see any objection to holding that the contract as found by the jury in the present case was neither an illegal contract nor one contrary to public policy." Later on Warrington L.J. said this: "The first question is, was the defendant under an implied obligation to take reasonable care that the contents of the letter should not be disclosed? The letter was clearly one of the class of documents to which his general obligation as confidential agent extended, and I think it is for him to make out that its nature as a libellous document excludes it from the class. The defendant contends in the first place that the letter was a criminal libel and that it would be contrary to public policy to treat as valid and binding even an express obligation to conceal a crime and a fortiori that the law would not imply such an obligation." This shows clearly that for the purpose of the agreement the case was treated as if there was a contract containing an express provision against disclosure. The learned Lord Justice continues: "Is there, then, anything in law to render invalid an obligation not to disclose a document which is libellous, or which contains evidence of a private wrong, or to exclude such a document from the implied obligation as to secrecy cast upon a confidential agent?" He then deals with the judgment of Wood V.-C. in *Gartside* v. *Outram* (1), to which I need not refer, and continues: "No other authority in point has been cited to us, but there are expressions in the judgment of Lindley L.J. in *Saunders* v. *Seyd & Kelly's Credit Index Co.* (2) which show that it did not occur to him that there was any objection in law to an obligation not to disclose a libellous document. Such a principle, if it existed, would be of very widespread application. A man discloses to his confidential agent that he has committed a trespass to land or goods, and the agent might with impunity communicate this to the persons concerned with disastrous results to his employer. Indeed I can see no distinction in this respect between cases of contract and cases of tort. Unless there be such a distinction, the disclosure by the agent of evidence of a breach of contract on his employer's part would be no breach of his duty to his employer. On the whole I can see no reason founded on public policy or any other ground why an agent should be at liberty to disclose evidence of a private wrong committed by his principal. . . . ." And Scrutton L.J. said this: "Even if Mr. Weld-Blundell must be taken to have known that he was doing wrong in sending a letter which the jury have found to be malicious on an occasion otherwise privileged, is there anything contrary to public policy in an agreement with the recipient to take reasonable care not to disclose such a letter? Or, to put it in another form, is it in accordance with public policy to enforce such an agreement? The law looks favourably on attempts to discover and prevent crimes. It frees a person from liability if he prosecutes an innocent man, provided he does so with reasonable and probable cause and without malice. It cannot be contrary to public policy to make full inquiries through competent agents, such as detectives and accountants, before proscecuting; inquiries which may easily involve communication by the parties to the inquiry, each to the other, of statements prima facie libellous about third persons. In view of the fact that to disclose a prima facie libellous statement to others may easily involve a risk of actions, and a risk of the jury's finding of malice destroying privilege, I can see nothing contrary to public policy in an agreement to use reasonable care not to disclose such statements to others. Judges and counsel are given absolute privilege in legal proceedings, because of the difficulty in doing their work, if they were to be exposed to actions inviting the jury to find that they acted maliciously and so lost their privilege. I can see nothing contrary to public policy in agreements between employers and employed to afford no opportunity for such actions. The duty of a solicitor employed in defence of a client to keep secret his client's communications, though evidence of that client's crimes, unless compelled to disclose them by legal authority, is a clear case of such a valid agreement. I think an agreement by a detective, private inquiry agent, or accountant to use reasonable care to keep secret the communications of his client as to the matter he is investigating is in accordance with public policy and should be enforced."

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(1) (1896) 75 L. T. 193.

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(1) (1856) 26 L. J. (Ch.) 113.

(2) 75 L. T. 193.

The case went to the House of Lords, but the decision of the Court of Appeal was not challenged on this point. (1) Lord Wrenbury, however, referred to it and said: "My Lords, we have heard little, and I have so far said nothing, as to the question discussed below and on which the Court of Appeal expressed an opinion—namely, whether the duty (although the Court of Appeal call it a contract) found by the jury to keep secret the letter of May 4 was contrary to public policy. All the Lord Justices held that it was not. I fully agree. The contrary proposition would seem to be that public policy requires that a man should spread a malicious libel to the best of his ability, or at least that he should inform the party libelled (if he does not already know it) in order that he may be induced to bring an action. I do not think public policy requires anything of the kind."

In my judgment the decision I have referred to covers the present case, and I hold, following that decision, that the agreement not to disclose is a valid and binding agreement.

The question then arises, what damages can be recovered for the breach by the defendant Mitchell? Again I think the decision in *Weld-Blundell* v. *Stephens* (2) covers the case. The second question there was whether the damages recovered against Weld-Blundell's libels contained in the letter of instruction were the natural and probable consequence of Stephens' breach of duty not to disclose that letter to any

(1) [1920] A. C. 956, 1000. (2) [1919] 1 K. B. 520.

other person. There was considerable difference of judicial opinion on the point. The Court of Appeal held by a majority—Scrutton L.J. dissenting—that the damages did not result from Stephens' breach of duty and consequently —no other damage having been proved—that Weld-Blundell was only entitled to nominal damages. This decision was upheld in the House of Lords by a majority of three to two. Lord Wrenbury in his speech deals with the point with great clarity. He says this (1): "By his letter of May 4, 1915, the plaintiff Weld-Blundell published to the defendant Stephens with express malice a libel upon certain persons, including Lowe and Comins. The relevant facts for the moment stop there. Whether Lowe and Comins knew it or not, there existed by reason of those facts a cause of action against Weld-Blundell at the suit of each of them. He lay under a legal obligation to pay damages for his wrongful act. They subsequently learned that they had this cause of action. Each of them sued and recovered damages and costs. Those damages were, of course, the pecuniary equivalent of the wrong done to the parties libelled. Weld-Blundell in those actions suffered no damage at all. He had to pay money, but a defendant is in no sense damaged by being compelled by legal process to satisfy his legal obligation. In that state of facts Weld-Blundell, in the present action, seeks to recover from Stephens the money he has had to pay to Lowe and Comins. He is entitled, he says, to recover it because Stephens, in breach of duty to him, did such acts as that Lowe and Comins became aware that they had the above right of action. If Stephens had not committed that breach of duty Lowe and Comins would not have known that they had, or might not have known that they had, and would not have exercised their right of action, and Weld-Blundell would not have been compelled to pay money. He is damaged, he says, by the amount of money he has had to pay, and Stephens is liable to him in the amount of damages and costs in the libel actions as damages for Stephens' negligence and breach of duty." If you omit the reference to express malice and substitute the name of the plaintiff company for that of Weld-Blundell, the name of Mitchell for the name of Stephens, and the name of X. & Company for the name of Lowe and Comins, and you substitute breach of contract for breach of duty, Lord Wrenbury's statement for all practical purposes fits the present case, with this exception: That instead of X. & Company having recovered damages against the plaintiff company, the plaintiff company has admitted liability to pay damages, which have not yet been ascertained. Lord Wrenbury continues: "My Lords, there is, in my judgment, more than one answer to this contention. The relations between Weld-Blundell and Stephens were such that the latter no doubt owed a duty to the former, and in that duty he was negligent. Weld-Blundell's liability to pay money to Lowe and Comins, however, arose not from that negligence, but from his own wrongful act in indulging in . . . . libel." (I have omitted the word "malicious.") ". . . . It bore no pecuniary relation to Stephens' wrongful act. Stephens' act was not the cause (whether with or without the word 'effective') of his having to pay, but was an act without which possibly he would never have been called upon to pay. It was not causa causans but at most causa sine qua non. In discharging his liability to pay damages for malicious libel Weld-Blundell suffered no damage at all. A man is not damnified by being compelled to satisfy his legal obligation. . . . . In the present case Weld-Blundell did an unlawful act in libelling Lowe and Comins. He cannot by legal process reimburse himself for the consequences and throw the cost upon another."

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(1) [1920] A. C. 997, 998, 999.

Again make the same substitutions and the necessary consequential alterations in the actual language of this passage, as I suggested should be made in the earlier passage I read from Lord Wrenbury's speech, and this passage as altered will entirely fit the present case. The matter is summed up in this sentence: "Nothing that Stephens did created the liability under which Weld-Blundell lay. I am quite unable to follow the proposition that the damages given in the libel actions are in any way damages resulting from anything which Stephens did in breach of duty." Apply that here, the disclosure by Mitchell, although in breach of his contract, did not create the liability under which the plaintiff company lies for the publication of its report on X. & Company. The liability for damages for libel does not arise directly or indirectly out of any act of the defendant Mitchell, and is not, therefore, within the scope of the express indemnity contained in condition 8 of the contract.

In my judgment, on the true construction of the contract, the defendant Mitchell can be made liable only for damages resulting from his own breach of contract, and these do not include any damage resulting from the publication of the libels by the plaintiff company. No special damage other than the damage for libel is suggested, and therefore only nominal damages are recoverable for Mitchell's breach.

The defendant Mitchell has by his counsel stated that there is no intention to make any further disclosure of the report in question, and that he is willing in the circumstances to give an undertaking not to make any further disclosure so long as that undertaking does not preclude his giving the evidence which may be necessary at the trial of the action for libel.

In those circumstances there will be judgment for the plaintiffs against Mitchell for 40*s*. damages, and liberty to apply as to an injunction. The plaintiff company must pay the costs of the defendant company, and the defendant Mitchell must pay those of the plaintiff company.

Solicitors: *Oswald Hickson, Collier & Co.; Cosmo Cran & Co.*

A. R. T.

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July 20, 21, 29.

In re HIND.

BERNSTONE *v.* MONTGOMERY.

[1929. H. 1583.]

Will—Settled Land—Name and Arms Clause—Surname—Forfeiture for Non-User—Mortgage by Borrower as Remainderman of Estate free of Entail—Base Fee—Conveyance by Borrower of half Estate to Lender free from right of Redemption—Death of Tenant for Life in 1929*—Land subject to Trust for Sale—Borrower's interest an absolute interest in Proceeds—Borrower's cessation of User of Surname—Conveyance of Mortgaged Property by Borrower to Lender to enlarge Base Fee—Base Fee not an "Entailed Interest"—Trusts ". . . . requisite for giving effect to the rights of the persons interested in the settled land"—Name and Arms Clause inoperative—Settled Land Act,* 1925 (15 *Geo.* 5, *c.* 18), *s.* 36, *sub-ss.* 1, 6; *s.* 117, *sub-s.* 1, *para.* xxxi.; *Sch. II., para.* 1, *sub-para.* 1—*Law of Property Act,* 1925 (15 *Geo.* 5, *c.* 20), *Sch. I., Part IV., paras.* 1, 2 —*Law of Property* (*Amendment*) *Act,* 1926 (16 & 17 *Geo.* 5, *c.* 11), *Schedule* —*Law of Property* (*Entailed Interests*) *Act,* 1932 (22 & 23 *Geo.* 5, *c.* 27), *s.* 1.

By s. 36, sub-s. 1, of the Settled Land Act, 1925: "If and when, after the commencement of this Act, settled land is held in trust for persons entitled in possession under a trust instrument in undivided shares, the trustees of the settlement (if the settled land is not already vested in them) may require the estate owner in whom the settled land is vested (but in the case of a personal representative subject to his rights and powers for purposes of administration), at the cost of the trust estate, to convey the land to them, or assent to the land vesting in them as joint tenants, and in the meantime the land shall be held on the same trusts as would have been applicable thereto if it had been so conveyed to or vested in the trustees."

By sub-s. 6: "For the purposes of this section land held upon the statutory trusts shall be held upon the trusts and subject to the provisions following, namely, upon trust to sell the same, with power to postpone the sale of the whole or any part thereof, and to stand possessed of the net proceeds of sale, after payment of costs, and of the net rents and profits until sale, ... upon such trusts . . . . as may be requisite for giving effect to the rights of the persons interested in the settled land."

By s. 1, sub-s. 1, of the Law of Property (Entailed Interests) Act, 1932: "At the end of subsection (6) of section thirty-six of the Settled Land Act, 1925, and at the end of section thirty-five of the Law of Property Act, 1925, and before the provision added to that section by the Law of Property (Amendment) Act, 1926, the following words shall, in each case, be inserted, namely:—'and the right of a person who, if the land had not been made subject to a trust for sale by virtue of this Act, would have been entitled to an entailed interest in an undivided share in the land, shall be deemed to be a right to a corresponding entailed interest in the net proceeds of sale attributable to that share.' "

By sub-s. 2: "This section shall be deemed to have come into operation on the first day of January, nineteen hundred and twenty-six, but shall have effect without prejudice to any order of the court made before the date of the passing of this Act, or to any title acquired by a purchaser for money or money's worth before that date."

A name and arms clause in a will dated February 14, 1863, provided that if any tenant for life or in tail of the testator's N. estates for the time being in possession refused to continue the use of the name and arms of H., the interest of that tenant for life or in tail and the limitations dependent thereon should cease. The tenant in tail in remainder (hereinafter called "the remainderman"), whose father was tenant for life in possession, mortgaged to the plaintiff the N. estates discharged as far as possible from his estate tail and from all estates to take effect after its determination or in defeasance of it: and the mortgage irrevocably appointed the plaintiff the remainderman's attorney in his name and on his behalf to convey the property to the plaintiff accordingly, but subject to the right of redemption under the mortgage. As this was done without the tenant for life's consent, only a base fee was created. By a conveyance dated April 3, 1914, the remainderman granted and released unto the plaintiff one undivided moiety of the N. estates, to hold unto and to the use of the plaintiff, his heirs, executors, administrators and assigns, with provisions as to barring the entail similar to those in the mortgage, but free from all right of redemption thereunder; and the remainderman covenanted also to perfect the disentail of the property within seven days of the tenant for life's death during his life. The tenant for life died on February 18, 1929. The remainderman did not perfect the disentail within seven days, so that what was comprised in the mortgage immediately after the death was the base fee, half of it being vested in the plaintiff subject to the mortgage and the conveyance of 1914. On March 3, 1929, the remainderman wrote informing the trustees of the will that he had decided to cease using the name of H. and to take another. On April 8, 1929, he wrote to them a letter confirming that decision; and on the same date, after the confirmatory letter had been written, there was executed by the plaintiff as his attorney a deed of confirmation supplemental to the mortgage and to the conveyance of 1914, whereby the remainderman conveyed to the plaintiff the hereditaments, moneys and investments secured by the mortgage upon limitations similar to those in the mortgage, to the intent that the base fee or other estate created and subsisting by virtue of the mortgage should be enlarged into an equitable fee simple, and that the mortgage should take effect out of the enlarged interest and the base fee be enlarged for all purposes; and the remainderman conveyed to the plaintiff one undivided moiety of the hereditaments or proceeds of sale thereof in equitable fee simple or absolutely, to the intent that, subject to the mortgage, one undivided moiety should belong to the plaintiff and the other to the remainderman in equitable fee simple or absolutely. By deed dated September 8, 1930, the remainderman recorded his change of name:—

Held, (1.) that, on the true construction of s. 36, sub-s. 1, of the Settled Land Act, 1925, the conveyance of 1914 came within the expression "trust instrument" in that sub-section;

(2.) that settled land may be held "on trust for persons entitled in possession under a trust instrument" in undivided shares created by a deed or event later than the instrument, which is nevertheless "the . . . . instrument creating the trust";

(3.) that the words "entailed interest" in the Law of Property (Entailed Interests) Act, 1932, do not apply to a base fee;

(4.) that the Court could not construe s. 36, sub-s. 6, of the Settled Land Act, 1925, so as to give effect to the name and arms clause, which was therefore inoperative.

In re Price [1928] Ch. 579; *In re Kempthorne* [1930] 1 Ch. 268; and *Portman* v. *Portman* (*Viscount*) [1922] 2 A. C. 473, considered.

WITNESS ACTION.

The following statement of the facts is taken from his Lordship's considered judgment:—

This is a curious and tangled tale in which the posthumous vanity of a testator, the methods of a money-lender, and the unusual mentality of a borrower have led to the once familiar legal problems relating to estates tail, base fees, name and arms clauses and the like, and to the not less difficult questions which arise out of the transitional provisions of the sweeping legislation of 1925.

The beginning of the history is the will of Henry Hind dated February 14, 1863. He died on November 18, 1863. Under his will, which I do not propose to state in full, and in the events which happened, one William Hind Smithard Hind, formerly William Hind Smithard, on December 14, 1893, became tenant for life in possession of certain real estates of considerable value, which I shall describe as the Northumberland estates, and his only son Henry Cram Smithard Hind, who was born on September 14, 1885, became tenant in tail general, subject to the life estate of his father. This gentleman is a defendant to the present summons, and I propose to refer to him as Mr. Smithard Hind, although it is contended that his present name is Henry Gibson-Craig. I do not think it is necessary to refer constantly to the alleged change of name. The limitations in the will were the usual

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limitations common at any rate before the year 1925, and there was contained in the will a provision of the nature usually described as a name and arms clause which it is necessary to read. It is in these terms: "Provided always and I do hereby direct that the said Joseph Smithard"—one of the persons entitled under the earlier series of limitations—"and every other person having a surname or arms different from the surname or arms hereinafter required to be used who shall become entitled in possession to my Northumberland properties or any of them as beneficial tenant for life or in tail under the limitations hereinbefore contained and not be a married woman or who shall be the husband of any female becoming so entitled shall as to every such tenant within eighteen calendar months after he or she shall become entitled in possession if of the age of twenty-one years or if not within eighteen calendar months after attaining that age and as to every such husband within eighteen calendar months after his wife shall become entitled in possession or shall be or shall have been married to him whichever shall last happen assume and use my surname of 'Hind' either alone or in addition to his or her usual surname (but so that the name of 'Hind' shall be the last and principal name) also the arms of 'Hind' quartered with his or her family arms and shall thenceforth use the same surname and arms accordingly And that every person excluded by reason of his or her already bearing the surname and arms aforesaid from the operation of the requisitions aforesaid shall continue the use of such surname and arms And that in case of neglect or refusal to comply with all or any of the requisitions of this proviso the estate or estates hereinbefore limited for the life of the person or as the case may be the estate tail hereinbefore limited to the person or ancestor of the person who or whose husband shall be guilty of such neglect or refusal shall cease and the subsequent limitations" to certain uses "for the life of such tenant shall spring up and immediately precede the use or uses from time to time in contingency upon trust to preserve the same but to permit the rents and profits to be received and enjoyed by the person or persons from time to time entitled to the first vested remainder for the time being therein." That, I may observe, is a clause drawn by a very competent draftsman and in relation to the Northumberland estates it is perfectly legal.

Mr. William Hind Smithard Hind lived until February 18, 1929, and during his lifetime no valid disentailing deed could be made without his consent. Mr. Smithard Hind, however, the tenant in tail in remainder, executed a mortgage to the plaintiff on November 21, 1906, in consideration of the advance to him of a sum of 1500*l.* There was provision for a policy in the usual way and the Northumberland estates, subject of course to the interest of the tenant for life, were conveyed to the mortgagee Jacob Hyman Bernstone, the plaintiff in the present action, to hold to his use and to the use of his heirs executors administrators and assigns subject to the life estate of the tenant for life, subject to any prior charges or powers overreaching the estate tail of Mr. Smithard Hind, but discharged so far as might be from the estate in tail of Mr. Smithard Hind and all other estates and interest to take effect after the determination or in defeasance thereof. There was then a proviso for redemption, and by another clause in the mortgage Mr. Smithard Hind irrevocably appointed the plaintiff to be his attorney in the name of Mr. Smithard Hind and on his behalf to sign, seal, and deliver any deed by way of disentail, for the purpose of conveying the premises to the plaintiff for an estate in fee simple, subject to the prior charges but discharged from the estate tail of Mr. Smithard Hind and all estates and interests to take effect after the determination or in defeasance of his estate tail, but subject to the right of redemption for the time being subsisting under the mortgage.

On April 3, 1914, Mr. Smithard Hind seems again to have required pecuniary assistance, and by a conveyance of that date made between him and the plaintiff, a conveyance which I shall describe as the conveyance of 1914, in consideration of 147*l.* 10*s.* then paid to Mr. Smithard Hind and of the covenant on the part of the plaintiff for payment to him of the annual sum of 160*l.* during the joint lives of the then tenant for life and Mr. Smithard Hind, the latter granted and released to the plaintiff one undivided moiety of the Northumberland estates to hold unto and to the use of the plaintiff his heirs executors administrators and assigns subject in common with the other moiety to the estate for life of the tenant for life, subject also to prior charges overreaching the powers but discharged as far as might be from the estate tail of Mr. Smithard Hind and all other estates and interests to take effect after the determination or in defeasance thereof, and free from all right of redemption under but subject in common with the other undivided moiety of the premises to all moneys due or to become due on the security of the mortgage and all death duties which would be payable on the death of the tenant for life in respect of the premises, one moiety of which was thereby assured; and there follow the usual covenants appropriate in such a case, including a covenant on the part of Mr. Smithard Hind to perfect the disentailment of the hereditaments and premises within seven days of the death of the tenant for life in the lifetime of Mr. Smithard Hind, the appointment of the plaintiff as attorney for Mr. Smithard Hind for the purpose of the disentailment, and a proviso which I do not think I need read. The tenant for life, as I have said, died on February 18, 1929, and it appears that there was no jointure subsisting in favour of a second wife of the tenant for life. When, therefore, the new legislation came into force—namely, on January 1, 1926—the legal estate became vested in one Henry Montgomery, the first of the defendants on the record, as from the death of the tenant for life as an executor of his will. Mr. Smithard Hind did not within seven days after the death of the tenant for life execute a deed perfecting the disentail of the Northumberland estates according to his covenant, and therefore the position, subject to the mortgage and to the conveyance of 1914, was that one moiety of the base fee was vested in the plaintiff and the whole of the base fee subsisting in the Northumberland estates was subject to the mortgage. The rate of interest payable under the mortgage was compound interest at the rate of 10 per cent., and accordingly by February 18, 1929, some twenty-three years after the date of the loan, the amount due was a very considerable sum. The conveyance of 1914 and the mortgage were enrolled in the Central Office in due course, but it was necessary, in order that the plaintiff should receive the rights or interests to which he was entitled by deed or covenant, that there should be a disentail promptly executed, and, travelling a little out of the order in date of the events, I will now state that the plaintiff, acting as attorney for Mr. Smithard Hind, executed on April 8, 1929, a deed of confirmation for the purpose of effecting the previous entail. It was expressed to be supplemental first to the mortgage and secondly to the conveyance of 1914, and by it Mr. Smithard Hind purported to convey and confirm to the plaintiff all the hereditaments moneys and investments described or referred to and assured by the mortgage to hold the same unto the plaintiff in equitable fee simple or absolutely, subject to the charges (if any) prior to and all powers overreaching the estate in tail of Mr. Smithard Hind under the said will of Henry Hind, but freed and discharged from all entailed interests of the mortgagor (that is, Mr. Smithard Hind), and also free from all remainders and interests to take effect after the determination or in defeasance of such entailed interests or the base fee into which the estate in tail of Mr. Smithard Hind was converted by the mortgage, to the intent that the base fee or other estate created by the mortgage and thus subsisting by virtue thereof should be enlarged into an equitable fee simple, and to the further intent that the mortgage should take effect out of the enlarged interest and that the base fee should be enlarged for all purposes: and by the said deed of confirmation Mr. Smithard Hind, as beneficial owner, purported to convey to the plaintiff one undivided moiety of the hereditaments or proceeds of sale thereof to hold to the plaintiff in equitable fee simple or absolutely according to the nature thereof to the intent that, subject to the mortgage on the entirety, one undivided moiety of the premises should belong to the plaintiff in equitable fee simple or absolutely and one undivided moiety thereof should belong to Mr. Smithard Hind in equitable fee simple or absolutely.

It is the fact, however, that just before the execution of the deed of confirmation Mr. Smithard Hind, acting on motives which may be left to conjecture, took steps to forfeit all his interests under the will. On March 23, 1929, he wrote a letter to Mr. Montgomery, the defendant, one of the trustees of the will, in the following terms: "Considering the circumstances which have arisen in connection with my inheritance of the Ovington Estate, I have decided to cease using the name of Hind, and will from now on be known by the name of Henry Gibson-Craig. Will you kindly inform your co-trustee of my decision? I am, yours sincerely, Henry Gibson-Craig lately known by the name of Henry C. Smithard Hind." On April 8, 1929, but, as I understand it to be admitted, before the deed of confirmation was executed by the plaintiff as attorney for Mr. Smithard Hind, the latter wrote the following letter to the trustees: "I hereby confirm my previous letter to you relative to my stated refusal to comply to (*sic*) the conditions of the will of the late Henry Hind Esq. and in consequence renounce my personal right to benefit under same. I presume you will notify your co-trustee and solicitors to the estate of my decision. Henry Gibson-Craig." It will be noted that in each of these cases Mr. Smithard Hind thought fit to sign his name as Henry Gibson-Craig. By a deed poll dated September 8, 1930, Mr. Smithard Hind, under the name of Henry Gibson-Craig, purported to record the fact that he had on March 23, 1929, assumed the name of Henry Gibson-Craig, and for the purposes of enrolment in the Enrolment Department of the Central Office of the Royal Courts of Justice he recorded the change of name to Henry Gibson-Craig. This deed poll was of course executed after the date of the deed of confirmation, and for the present purpose it is important, if at all, only as evidence that he did assume his new name on March 23, 1929.

By this summons, issued on May 9, 1929, amended on August 1, 1929, and re-amended on May 2, 1930, and April 15, 1932, the plaintiff asked (inter alia) for a declaration that the whole of the Northumberland estates were vested in the defendant Montgomery as personal representative of William Hind Smithard Hind or alternatively in him and another as trustees of the will upon the statutory trusts, and that, despite Henry Cram Smithard Hind's purported discontinuance of the use of the surname "Hind," the plaintiff was absolutely entitled to one moiety of the proceeds of sale thereof and of the net rents and profits until sale and was entitled to claim as mortgagee of the remaining moiety, under and by virtue of the mortgage.

The defendants to the summons were the trustees of the will, Reginald Frederick Sturdy, who was interested as equitable tenant in tail in the event of its being determined that the estate tail of Henry Cram Smithard Hind was forfeited without having become effectually barred, and Henry Cram Smithard Hind.

F. R. Evershed for the plaintiff. There has been no effective forfeiture or discontinuance of the use of the name. Alternatively, by virtue of the legislation of 1925, especially s. 36 of the Settled Land Act, 1925, which provides that undivided shares in land shall take effect behind a trust for sale of the land, on the death of William Hind Smithard Hind the property became subject to an immediate trust for sale and the interest of the defendant Henry Hind became an absolute interest in personalty: see *In re Price* (1) and *In re Kempthorne.* (2) The forfeiture clause ceased to have any operation. Fifteen months before the date of the deed poll the document of April 8, 1929, perfecting the disentailing assurance, had been executed. The base fee was then enlarged, and any subsequent discontinuance of the use of the name would be ineffective. Discontinuance must take a more definite form than a statement to one person that the owner of the name has decided to change it.

As to the law on the point, it can be taken that the mortgage and the conveyance of 1914 did operate to create a base fee. Sect. 1, sub-s. 1, of the Settled Land Act, 1925, states what constitutes a settlement. When the Act came into force the land was settled land under the will and the conveyance. At the date of William Hind Smithard Hind's death, the land, by the operation of the will and the conveyance of 1914, was held upon trust under a trust instrument for persons in undivided shares, upon the statutory trusts. The words " . . . . held . . . . under a trust instrument . . . ." in s. 36, sub-s. 1, of the Settled Land Act, 1925, should be construed so as to include, in the present case, the will and the conveyance. By s. 117, sub-s. 1, para. xxxi., of the Act: " . . . . 'trust instrument' means the instrument whereby the trusts of the settled land are declared, and includes any two or more such instruments. . . . ." Every instrument which has the effect described by the Act produces the results provided by the Act. If s. 36 of the Act does not apply to the present case, it is difficult to see what section of the Act does apply. Alternatively, para. 2 of Part IV. of the First Schedule to the Law of Property Act, 1925, applies. (1) In that paragraph the words " . . . . and the land is not settled land when the shares fall into possession . . . ." are difficult to construe; but if s. 36 of the Settled Land Act, 1925, does not apply, that paragraph does apply.

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(1) [1928] Ch. 579.

(2) [1930] 1 Ch. 268.

Norman Daynes K.C. and *J. A. Mackintosh* for the trustees of the settlement. The Court may have to consider the effect of s. 1, sub-s. 1, of the Law of Property (Entailed Interests) Act, 1932. That sub-section contains an amendment which is applied to s. 36, sub-s. 6, of the Settled Land Act, 1925, and s. 35 of the Law of Property Act, 1925. (2) The question arises whether the protection acquired by a purchaser is acquired as from the date of the Act of 1932 or goes back to January 1, 1926.

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(1) First Schedule, Part IV., para. 2: "Where undivided shares in land, created before the commencement of this Act, fall into possession after such commencement, and the land is not settled land when the shares fall into possession, the personal representatives (subject to their rights and powers for purposes of administration) or other estate owners in whom the entirety of the land is vested shall, by an assent or a conveyance, give effect to the foregoing provisions of this Part of the Schedule in like manner as if the shares had fallen into possession immediately before the commencement of this Act, and in the meantime the land shall be held on the statutory trusts."

(2) Sect. 35, as amended by the Schedule to the Law of Property (Amendment) Act, 1926: "For the

Cecil Turner for Reginald Frederick Sturdy. The letters of March 23, 1929, and April 8, 1929, having regard to their terms and to the fact that they were written to the trustees of the trust instrument, are conclusive as to the effectiveness of the mortgagor's refusal to comply with the terms of the will. The claim of Reginald Sturdy will succeed if it can be shown that the land is not held upon the statutory trusts. The difficulty is that if the Court came to that conclusion it would show that there is a hiatus in the Settled Land Act, 1925, not consonant with the general scheme of the legislation of which that Act is part. The success of the plaintiff's claim must depend upon the definition of "trust instrument." The limitations in the will are legal limitations and the mortgage does not declare any trusts at all. Therefore, to say that the combination of documents in the present case falls within the words "trust instrument" in the phrase, "If . . . . settled land is held in trust for persons entitled in possession under a trust instrument in undivided shares, ..." in s. 36, sub-s. 1, of the Settled Land Act, 1925, would be straining the language beyond reasonable limits. There is an artificial definition of "trust instrument" in para. 1, sub-para. (1.), of the Second Schedule to the Settled Land Act,

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purposes of this Act land held upon the 'statutory trusts' shall be held upon the trusts and subject to the provisions following, namely, upon trust to sell the same and to stand possessed of the net proceeds of sale, ... upon such trusts, ... as may be requisite for giving effect to the rights of the persons (including an incumbrancer of a former undivided share or whose incumbrance is not secured by a legal mortgage) interested in the land.

Where

(*a*) an undivided share was subject to a settlement, and

(*b*) the settlement remains subsisting in respect of other property, and

(*c*) the trustees thereof are not the same persons as the trustees for sale,

then the statutory trusts include a trust for the trustees for sale to pay the proper proportion of the net proceeds of sale or other capital money attributable to the share to the trustees of the settlement to be held by them as capital money arising under the Settled Land Act, 1925."

1925 (1), that being the schedule containing the transitional provisions affecting settlements existing when the Act came into force, but there is no corresponding artificial definition bringing the instruments which are before the Court in the present case within any definition of a trust instrument. There is not much doubt as to the general scheme of the legislation of 1925. At the time when these shares fell into possession the limitations were still subsisting, because the conditions required to bring into play para. 2 of Part IV. of the First Schedule to the Law of Property Act, 1925, were not satisfied. That paragraph was dealt with in *In re Cugny's Will Trusts.* (2) Assuming that in the present case the statutory trusts have arisen, it is necessary to decide what is the effect of the addition to the definition of "statutory trusts" by s. 1, sub-s. 1, of the Law of Property (Entailed Interests) Act, 1932. If the amendment in that sub-section applies to the present case, the contention that the name and arms clause is not effective to restore ultimate limitations must fail. If, however, that amendment does not apply, for the plaintiff to succeed it must be established that he acquired a title for money or money's worth before the Law of Property (Entailed Interests) Act, 1932, came into force. The amendment must have been intended to operate in regard to titles acquired since the statutory conversion effected by sub-s. 6 of s. 36 of the Settled Land Act, 1925, came into operation. If that is not so the effect of barring the entail is to defeat the forfeiture clause: that must follow from the decision of Clauson J. in *In re Price.* (3) The present case, however, is different from *In re Price.* (3) It would not be inconsistent with the decision in that case to hold that the will in the present case should operate in regard to personalty in so far as the law allows limitations in regard to realty to apply to personalty: *In re Cornwallis.* (4) In cases where the statute operates to convert into personalty the trusts will take effect as nearly as possible in accordance with the tenor of the will, having regard to the limitations of the real estate; and, inasmuch as it is possible to give personalty over in the event of forfeiture, provided it occurs within legal limits, the Court will give effect to such a gift over if forfeiture does occur.

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(1) Sch. II., para. 1, sub-para. (1.): "A settlement subsisting at the commencement of this Act is, for the purposes of this Act, a trust instrument."

(2) [1931] 1 Ch. 305.

(3) [1928] Ch. 579.

(4) (1886) 32 Ch. D. 388.

The defendant Henry Cram Smithard Hind was not represented.

F. R. Evershed in reply. The effect of s. 36, sub-s. 6, of the Settled Land Act, 1925, is that the settlement must be read as though it had originally been a settlement of personalty, that being the reasoning followed in *In re Price.* (1) The Court would then have to invent a series of executory limitations designed to be effective for the maximum possible period of time. A forfeiture clause attached to a settlement of real estate operates as a remainder. In the present case it is impossible to make the provisions of the forfeiture clause attach to the personalty and create a number of executory interests. The operation of the Law of Property (Entailed Interests) Act, 1932, depends upon its being predicated of Henry Hind that he had an entailed interest. All that he had was a base fee. Thus the Law of Property (Entailed Interests) Act, 1932, which applies only to entailed interests, cannot apply to the present case. That follows also from s. 130 of the Law of Property Act, 1925, which states how entailed interests in real and personal property may be created.

Cur. adv. vult.

July 29. MAUGHAM J. [after stating the facts as set out above :] It is clear that after the deed of confirmation there could be no effective forfeiture, since the base fee of Mr. Smithard Hind, if still existing, was thereby converted into an absolute interest, all the estates which were limited to take effect in defeasance of the estate tail being barred : *Doe* d. *Lumley* v. *Scarborough* (*Earl*) (2) and *Milbank* v. *Vane.* (3)

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(1) [1928] Ch. 579.
(2) (1835–6) 3 A. & E. 2, 897.
(3) [1893] 3 Ch. 79.

The question arises whether between March 23, 1929, and April 8, 1929, Mr. Smithard Hind had neglected or refused to continue the name of Hind so as to occasion a forfeiture under the name and arms clause. Evidence might have been adduced to show that the letters were not in some respects genuine; for example, that they were intended merely as a threat with the object of obtaining further sums of money from the plaintiff and were not in fact acted upon. There is no doubt evidence to show that other persons have referred to Mr. Smithard Hind by that name since March 23, 1929. On the other hand the letters which I have read seem to me to show that he has refused to continue the use of the name; and I am unable to come to the conclusion that the letters, unexplained as they are, do not indicate a definite refusal to continue the use of the name; and the recital in the deed poll seems to me to show that the letters were not written merely as a threat. The condition in the name and arms clause is a legal condition which must be strictly construed, and there being no sufficient evidence to displace the effect of the letters I must come to the conclusion that, apart from the result, if any, of the legislation of 1925, the interests of the plaintiff would have been forfeited by reason of the act of Mr. Smithard Hind.

Turning now to the legislation of 1925 it will be observed, first, that legal estates in undivided shares in land are no longer capable of subsisting or of being created (see s. 1, sub-s. 6, of the Law of Property Act, 1925); and, secondly, that land held in undivided shares in possession must be held by trustees for sale, the beneficial interests in the land being made to attach to the proceeds of sale and to the rents and profits before sale. Sect. 34 of the Act, which deals with the effect of dispositions after the date of the Act to tenants in common, appears not to extend to dispositions made before the date of the coming into force of the Act. By Part I. of the First Schedule to the Act (Transitional Provisions) legal estates in land were converted into equitable interests. Para. 1 of Part IV. of the same Schedule (the Part which contains provisions subjecting land held in

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HIND, *In re.* BERNSTONE *v.* MONTGOMERY.

undivided shares to a trust for sale) clearly does not apply in the present case, because immediately before the commencement of the Act the land was not held in undivided shares vested in possession. Para. 2 of Part IV. of the same Schedule does not in my opinion apply, since that paragraph is confined to cases where the undivided shares in land created before the commencement of the Act fall into possession after such commencement and the land is not settled land "when the shares fall into possession." The words "when the shares fall into possession" must mean immediately before the shares fall into possession; since after the shares have fallen into possession a trust for sale is immediately imposed. In the present case, as I have pointed out, the land was settled land at the instant before the undivided shares fell into possession. The result, I think, is that unless s. 36 of the Settled Land Act, 1925, is held to apply there is a lacuna in the Act and no provision for dealing with undivided shares in such a case as I have to deal with, and that although the Partition Acts are wholly repealed except so far as pending litigation is concerned. The difficulty of making s. 36, sub-s. 1, applicable lies in the words: "If . . . . settled land is held in trust for persons entitled in possession under a trust instrument in undivided shares . . . ." The words "trust instrument" are defined in s. 117, sub-s. 1 (xxxi.), to this extent, that we are told that a trust instrument means the instrument whereby the trusts of the settled land are declared, and includes any two or more such instruments and a settlement or instrument which is deemed to be a trust instrument. To ascertain the persons entitled to the Northumberland estates in the present case we have to look at the will and at the conveyance of 1914, and it is true that that conveyance can only with difficulty be described as an instrument declaring the trusts of the settled land. On the whole, however, I think I am justified in giving a beneficial construction to the Act and thus avoiding what would otherwise be a somewhat serious omission. It may be observed that the difficulty may arise otherwise than by a conveyance. For instance, if land is settled upon A. for life with remainder to B., it might well be that, on the intestacy of B., two or more persons, for instance, his daughters, might become entitled in remainder to the estate in undivided shares. A position would then have arisen very similar to that which exists in the present case. I have come to the conclusion that settled land may be held in trust for persons entitled in possession in undivided shares under a trust instrument, although the trust instrument itself does not cause the division, but the division into shares is effected by a subsequent deed or event, and that in such a case the trust instrument should be regarded as the will or other instrument creating the trust. Accordingly in the present case I am of opinion that s. 36, sub-s. 1, of the Settled Land Act, 1925, applied as from the coming into force of the Act, and that the trustees of the will might have required the estate owner in whom the settled land was vested to convey the land to them, or to assent to the land vesting in them as joint tenants, and that under sub-s. 2 the settled land so held in trust became subject to the statutory trusts.

The next question that arises is as to the true construction to be placed upon sub-s. 6 of s. 36 of the same Act, whereby the land is held upon trust to sell and to stand possessed of the net proceeds of sale "upon such trusts and subject to such powers and provisions as may be requisite for giving effect to the rights of the persons interested." Can these trusts properly be worded so as to give effect to the name and arms clause contained in the will? In the case of *In re Price* (1) the effect of the statutory conversion caused by s. 35 of the Law of Property Act, 1925, as regards undivided shares in land, was most carefully considered, and the decision of Clauson J. was followed by the Court of Appeal in the case of *In re Kempthorne*. (2) In particular it was held that s. 130 of the Law of Property Act, 1925, had not the effect of causing an entailed interest in an undivided share of land to become an entailed interest in personalty within the meaning of the Act. It accordingly followed that the tenant

(1) [1928] Ch. 579.

(2) [1930] 1 Ch. 268.

in tail of an undivided share in the land prior to the Act became absolutely entitled to his appropriate share in the proceeds of sale of the land, the conversion of which was effected by s. 35.

It has been argued that an amending Act which last month received the Royal Assent—namely, the Law of Property (Entailed Interests) Act, 1932—applies, with the result that s. 35 of the Law of Property Act, 1925, has to be read as if the following provision were added to that section—namely, " and the right of a person who, if the land had not been made subject to a trust for sale by virtue of this Act, would have been entitled to an entailed interest in an undivided share in the land, shall be deemed to be a right to a corresponding entailed interest in the net proceeds of sale attributable to that share." On consideration I do not think that the words " entailed interest " in this amendment can be treated as extending to a base fee. A reference to s. 1, sub-s. 1, para. (ii), of the Settled Land Act, 1925, shows that the Legislature from the very beginning of the Act distinguished between an entailed interest and a base fee; and a similar distinction is to be found in several other places in the Act, and in particular in s. 1, sub-s. 5, para. (*a*), and in s. 9, sub-s. 1, para. (iv) (*b*) and (*c*). All these are provisions which make a clear distinction between an " entailed interest " and " a base or determinable fee," showing that the Legislature regards them as two different things. Apart, therefore, from s. 1, sub-s. 2, of the Law of Property (Entailed Interests) Act, 1932, which may well have had the effect of saving the title, if any, acquired by the plaintiff in the present case, I am of opinion that the position is not altered by that Act and I must, therefore, proceed to consider the matter apart from those amendments.

It is urged on behalf of the plaintiff that as the result of the legislation of 1925, and bearing in mind the decision of *In re Price* (1), the plaintiff became on the death of the tenant for life on February 18, 1929, absolutely entitled to the whole of the net proceeds of sale of the Northumberland estates,

(1) [1928] Ch. 579.

subject to redemption, and that no trust can properly be framed following the words of the will which would have the effect of destroying this interest by reason of a subsequent failure by Mr. Smithard Hind to comply with the name and arms clause. I have carefully considered the effect of the words with which sub-s. 6 concludes, in so far as they direct that the proceeds of sale shall be held upon such trusts and subject to such powers and provisions as may be requisite for giving effect to the rights of persons interested in the settled land. It is to be observed that there is no reference whatever to the rule against perpetuities. The name and arms clause as contained in the will was not void for perpetuity, for the reason that conditional limitations which must take effect, if at all, during the continuance of an estate tail are never too remote: see Gray on Perpetuities, 3rd ed., para. 449. Apart from s. 130 of the Law of Property Act, 1925, which, as I have pointed out, cannot be made applicable to the present case, a settlement of proceeds of sale of land following the trusts and provisions of the will as far as posssible would be void for perpetuity: see *Scarsdale* (*Lord*) v. *Curzon* (1) and *Portman* v. *Portman* (*Viscount*). (2) The last named case shows that where chattels are settled to go and be held, so far as the rule of law and equity will permit, with a mansion house strictly entailed by will or settlement with the addition of a shifting clause not widely differing in its effect from the ordinary name and arms clause, the shifting clause is void as regards the chattels by reason of its transgressing the rule against perpetuities; and even the words, "so far as the rules of law and equity will permit," do not avail to prevent this result. I do not conceive that the Court is justified in putting a construction on the sub-section in question which will authorize the insertion in the trusts of a clause limiting the operation of the name and arms clause to the permitted period. The sub-section does not, I think, warrant the introduction into the trusts, powers and provisions of any direct reference to the period allowed by the rule against perpetuities, no such reference being contained in the will, or the selection of the interests of persons born within the legal limits after the death of the testator for the purpose of imposing on those interests conditions specially designed to carry out as far as practicable the intention of the testator. The framing of trusts, which would be at once artificial and imperfect as regards the end in view, is not in my judgment a thing pointed out or permitted by the words of the sub-section.

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(1) (1860) 1 J. & H. 40.

(2) [1922] 2 A. C. 473.

I hold, therefore, that in the events which have happened the name and arms clause became wholly inoperative.

[His Lordship then held, after discussion with counsel, that the plaintiff was absolutely entitled to the proceeds of sale of the property, subject to a right of redemption as to a moiety in the defendant Henry Cram Smithard Hind.]

Solicitors: *Field, Roscoe & Co., for Wilkinson & Marshall, Newcastle-on-Tyne; King, Wigg & Brightman, for Keenlyside & Forster, Newcastle-on-Tyne.*

K. R. A. H.

In re SCIENTIFIC POULTRY BREEDERS' ASSOCIATION, LIMITED.

C. A.
1932
Oct. 18.

[No. 00508 of 1932.]

Company—Limited by Guarantee—Memorandum of Association—Improvement of Poultry Industry—Not for Profit of Members—Alteration of Objects—Proposed Remuneration of Members of Governing Body—Petition to obtain Sanction of Court to Alteration—Jurisdiction to sanction—Companies Act, 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *ss.* 4, 5.

An association formed and registered under the Companies Acts, 1908–1917, for the promotion of a scientific object by its memorandum and articles prohibited the payment of any remuneration to or the division of profits among the members of the governing body. The business and membership of the association having greatly increased, the members of the governing body found that they were unable to give the necessary time to the management of its affairs unless they were paid for their services. A petition was therefore presented to the Court by the association after approval by the members in general meeting to remove the prohibition against payment of remuneration to the members of the governing body by an alteration of the objects clause of the memorandum under s. 5 of the Companies Act, 1929.

Eve J. refused to accede to the proposed alteration of the memorandum on the ground that it involved a fundamental change in the constitution of the association, and held that the case was covered by the decision in *In re Society for Promoting Employment of Women* [1927] W. N. 145:—

Held, by the Court of Appeal (reversing the decision of Eve J.), that the proposed alteration of the memorandum was an alteration "with respect to the objects of the company" which was desirable for the purpose of more efficiently carrying out the main object of the company—namely, the improvement and encouragement of poultry breeding, and therefore came within s. 5, sub-s. 1, of the Companies Act, 1929, and ought to be sanctioned by the Court.

Incorporated Glasgow Dental Hospital v. *Lord Advocate* 1927 S. C. 400 followed and approved.

In re Society for Promoting Employment of Women [1927] W. N. 145 distinguished.

Decision of Eve J. [1932] 2 Ch. 212 reversed.

Appeal from a decision of Eve J. (1)

The Scientific Poultry Breeders' Association was registered on January 31, 1929, under the Companies Acts, 1908–1917, as a company limited by guarantee with the object of improving breeds of poultry and promoting more scientific methods in feeding, housing and breeding poultry. The memorandum was framed with the object of obtaining the licence of the Board of Trade to dispense with the use of the word "limited," and an application was made for that purpose, but owing to one of the clauses in the memorandum it did not succeed. The memorandum at present prohibited the payment of any remuneration to or the division of any profits among the members of the governing body, and provided that no member of that body should be appointed to a position on the salaried staff.

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(1) [1932] 2 Ch. 212.

The business and membership of the association had now so greatly increased that the members of the governing body found that they were unable to give the necessary time to the work unless they were paid for it. It was then proposed to add to the objects specified in the memorandum the following sub-clause: "To remunerate members of the association or governing body of the association and others for work done or services rendered for the association," and to add a proviso to the clause prohibiting the distribution of profits among the members as follows: "Provided that nothing herein shall prevent any member of the association deriving any profit or other advantage from or under any scheme or schemes under clause 3 (k) hereof." The proposed alterations were approved by the members of the association in general meeting, and the association presented a petition to obtain the sanction of the Court thereto.

Eve J. refused to sanction the proposed alterations of the memorandum on the ground that they involved fundamental changes in the constitution of the association, and held that the case was covered by the decision in *In re Society for Promoting Employment of Women.* (1)

The association appealed.

F. R. Evershed for the appellant. Eve J. has held that the proposed alterations in the memorandum if sanctioned would involve a fundamental change in the constitution of the association. This would not, it is submitted, be the case. The association does not seek to alter the main object of the association, which is the encouragement of the poultry husbandry, but to enable it to carry on its business more efficiently, or to attain its main purpose—the improvement of poultry breeding—by new or improved means. The proposed alterations are so clearly connected with the objects enumerated in the objects clause of the memorandum that they fall within the expression of alterations " with respect to the objects of the company " in s. 5 of the Act of 1929.

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(1) [1927] W. N. 145.

The present case, it is submitted, falls within the decision in *Incorporated Glasgow Dental Hospital* v. *Lord Advocate* (1), and particularly within the observations of Lord Hunter in that case. (2)

In re Society for Promoting Employment of Women (3), on which Eve J. relied, is distinguishable. That case had not to deal with the interpretation to be placed upon the words " with respect to the objects of the company " in s. 5 of the Act of 1929.

LORD HANWORTH M.R. This appeal must be allowed. It raises an important point, and one to which the learned judge has of course given careful consideration.

By s. 4 of the Companies Act, 1929, it is provided that: " A company may not alter the conditions contained in its memorandum except in the cases, in the mode and to the extent for which express provision is made in this Act." One turns, therefore, to the following section, s. 5 as it is now in this present Act, which provides (sub-s. 1) that " Subject to the provisions of this section, a company may, by special resolution, alter the provisions of its memorandum with respect to the objects of the company, so far as may be required to enable it—(*a*) to carry on its business more economically or more efficiently; or (*b*) to attain its main purpose by new or improved means." I pause there for a moment. It is quite clear from the section I have read that the intention of the Legislature was to prevent too easy an alteration of the conditions contained in the memorandum of association of a company; but it is also plain that there was no intention to shut

(1) 1927 S. C. 400.

(2) Ibid. 406.

(3) [1927] W. N. 145.

out a company from making some alteration which was of a nature and quality to enable it to carry on its business more economically or more efficiently, or to attain its main purpose by new and improved means. Bearing in mind that those subsidiary words are in s. 5 one turns to see what are the main provisions of s. 5, which deal with an alteration of the provisions of its memorandum with respect to the objects of the company. Now those few words " with respect to " are no doubt words which are not easy of definition. The probability is that the Legislature intended that they should not be too definite, and to give a discretion to the Court; but the sub-paras. (*a*) and (*b*) show the sort of course which was intended to be followed—namely, the efficient and economical carrying on of the main objects of the company.

In the present case we have an association which by special resolution has confirmed the alteration for which it is now sought to obtain the sanction of the Court, and the alteration in effect is to be found in clause 4 of the memorandum of association. It removes the portion of the proviso of clause 4 which prohibits any member of the council of management or governing body of the association receiving any sum in respect of his services—I am putting it quite shortly, and in lieu of that it introduces the words: " Provided that nothing herein shall prevent any member of the association deriving any profit or other advantage out of the funds of the association or otherwise from or under any scheme or schemes established under clause 3 (k) hereof." And, "provided that nothing herein shall prevent the payment, in good faith, of reasonable and proper remuneration to any officer or servant or member of the council or governing body." Those two provisoes so amended remove a possible difficulty which arises under the interpretation of sub-clause (k) of clause 3, and also definitely remove any prohibition against the payment of a reasonable and proper remuneration to a member of the council or governing body.

Upon the facts that are before us and have been accepted by the learned judge, it has been made plain that those alterations are sought in the interests of carrying on the main purpose of the association, which is, broadly speaking, the encouragement of poultry husbandry. Since the company was incorporated, which was in January, 1929, it has outgrown its system, which was efficient and good enough to carry on the business of some 350 members, and their dealings under sub-clause (k), which amounted to some 20,000*l.* per annum; but which was insufficient and inefficient for carrying on the business of some 20,000 members, and dealing in their commercial operations under sub-clause (k), which now involve a yearly turn-over of something like half a million. It is not the object of the association—namely, the encouragement of poultry husbandry—that is sought to be altered. What is asked for is that this encouragement of poultry husbandry should be undertaken, and made efficient, by a system and organization adequate to cope with the largely increased number of members, and consequently largely increased commercial dealings.

Eve J. has given his approval and blessing to the good faith with which these alterations were effected, to the purpose which is sought to be achieved, and to the alterations in their terms; but he has felt himself unable to accede, or to do what he would apparently wish to do—namely, to approve these alterations—by reason of the provisions of sub-s. 1 of s. 5, and particularly to the words "with respect to the objects of the company," because his view is that enabling a payment to be made now to a member of the council or governing body of the association is a fundamental alteration of the objects of the company. I find myself unable to accept that view. Indeed I have some little difficulty in following Eve J., because at the outset of his judgment he says: "The object of the pending application is to obtain confirmation by the Court of a special resolution altering the memorandum of association with respect to its objects in order to enable it to carry on its business more efficiently." As has been pointed out, there is often a difficulty in determining what is an object, and what is a power of the company. The two gradually fade into one another, but it would appear plain enough that the object with which this association was founded is still the main purpose of it. There is no intention to alter its system or to affect its main object. What is pointed out is that efficiency is lost, because it is difficult to find the human element to control these operations unless provision is made for an adequate payment to the persons who practically have to give their whole time to it. Eve J. has found himself unable to do this, because, as he says, it would be an alteration of one of the fundamental objects of the association. I think myself that that metaphorical term leads one astray. One has not to decide whether it is fundamental in one sense or another. One still has to see whether or not the main object of the association is maintained, and to see whether or not while that object is maintained there is something inserted ancillary to that object—namely, a better method of carrying that object into operation. In my view that is the true summary of the alterations which are sought, and in that sense they fall within the words "with respect to the objects of the company."

I find myself in agreement with the decision of the Court of Session in *Incorporated Glasgow Dental Hospital* v. *Lord Advocate* (1), and particularly with the observations there made by Lord Hunter, who said (2): "It is quite clear that the whole objects of the company may not necessarily be contained in a single clause, and that, even in the objects clause, you necessarily have material that deals with the objects only in the sense of enabling the proper attainment of these objects to be arrived at"; and he characterizes the alteration sought as "an alteration admittedly for the better attainment of the real object of this company." Those two sentences appear to apply with great force to the present application, and under those circumstances I think it is right that it should be acceded to.

With regard to the case of *In re Society for Promoting Employment of Women* (3) that was before Russell J., as

(1) 1927 S. C. 400.
(2) Ibid. 406.
(3) [1927] W. N. 145.

he then was, I do not think it offers any impediment to our decision here, because what he was there dealing with was an application which would have cancelled the sanction on which a certain limitation of the company rested. There was no reason for it and he refused to allow the proposed alteration. It is not a case which really deals, as the Court of Session's case (1) does, with the meaning and interpretation to be put upon the words " with respect to." For these reasons I think the appeal must be allowed, and the order asked for granted.

LAWRENCE L.J. This appeal raises the question whether the proposed alterations of a memorandum are alterations with respect to the objects of the company within the meaning of s. 5, sub-s. 1, of the Companies Act, 1929. In my opinion that section ought not to be construed too narrowly, and I agree with the interpretation placed upon it by the Lord Justice-Clerk in *Incorporated Glasgow Dental Hospital* v. *Lord Advocate* (2), where he says that the corresponding section in the 1908 Act, s. 9, sub-s. 1, might be read as if it provided that the company might alter any provision to be found within the four corners of its memorandum which relates to the objects of the company. Placing that interpretation on s. 5, sub-s. 1, the question is whether the proposed alteration relates to an object to be found within the four corners of the memorandum. In my opinion it does. There is a power in clause 3 (k), " To establish, manage, supervise or conduct any scheme or schemes by which members of the association may be enabled to buy or sell to the best advantage poultry, poultry produce, poultry food, and other things of any kind relating to the poultry industry, or for all or any of the foregoing purposes." In close connection with that provision, and with some of the other provisions to which I need not refer, one has to read clause 4 of the memorandum, which provides that " The income and property of the association, whencesoever derived, shall be applied solely towards the promotion of the objects of the association as set forth in this memorandum of association," and then follow the other provisions which Mr. Evershed has read to the Court. It seems to me that all the provisions of clause 4, although not contained in the objects clause of the memorandum, are so associated with the objects as to cause any alterations therein to be alterations with respect to the objects of the company within the meaning of s. 5 of the Act. The main purport of the present alterations is to provide for the remuneration of the persons constituting the governing body of the company, the work having increased so as to make it reasonable that such work should no longer be conducted without remuneration; and also to enable the members to derive some profit by way of discount, and other benefits from the carrying out of any scheme under clause 3 (k). The view I take is that the clause which it is proposed to alter, and the alterations themselves, are matters so closely connected with the objects of the association enumerated in clause 3 that they come well within the expression of alterations "with respect to" the objects of the company contained in clause 5. The learned judge has come to the conclusion that the alterations are desirable and put forward by the company in good faith; but he has also come to the conclusion that the alterations are such as fundamentally to alter the character of the company. In one sense that second finding seems to show that in the learned judge's opinion the alterations are alterations with respect to the objects of the company, because the alteration is an alteration in the method of applying the income and property of the association derived from the carrying out of those objects; and, with the greatest respect to the learned judge, I think that the fact that the alterations substantially alter the objects is not the relevant consideration for the purpose of ascertaining whether the Court has jurisdiction to sanction the alterations. It may well be that if the alteration is of such a character as substantially to alter the main object for which the company was formed, the Court ought not to sanction the alteration under s. 5, sub-s. 1, although it might come within the words of the section; but in a case like the present, where the alterations are desirable for the purpose of more efficiently carrying on the main objects of the company, which are left unaltered, and of attaining those objects by improved means, I am of opinion that the alterations come within the scope of s. 5, sub-s. 1, even although they do alter the character of the company in this sense, that for the first time the members of the association will be entitled to derive profits from the undertaking, and the members of the governing body of the association will be enabled to receive remuneration for their services in directing the affairs of the association.

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(1) 1927 S. C. 400.

(2) Ibid. 400, 406.

For the reasons I have stated I think that the learned judge has taken too narrow a view of the scope of s. 5, sub-s. 1, and that the alterations are such as the Court has power to sanction under that section, with the result that, as there is no question as to the desirability of sanctioning the alterations, the alterations ought to be sanctioned.

Romer L.J. I agree. In my opinion the provisions contained in clause 4 of the memorandum of association of this company are provisions with respect to the objects of the company. It is not always easy to distinguish between objects of a company properly so called and powers given to the company for the purpose of carrying out those objects. Take, for example, a power to mortgage. In one sense this is merely a power; in another sense it is a subsidiary object of the company and it is included usually in the objects clause in the memorandum; so, too, the express power contained in the objects clause to remunerate members of the company for services rendered to the company. In one sense it is not an object. Perhaps it more properly should be referred to as a power; but it is a provision relating to the manner in which the company may carry out its objects, and is therefore, in my opinion, a provision with respect to those objects. In the present case there is no such power to be found in the objects clause of the company. On the other hand, there is to be found

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in clause 4 a provision that the company shall not, except to a certain extent, remunerate the members of the company for services rendered; it shall not distribute the profits of the company amongst the members; in other words, we find in clause 4 a provision that the objects of the company, in whatever other manner they may be carried out, are not to be carried out in that manner; none the less, though it is negative in its terms, it is a provision in respect to the objects of the company.

I entirely associate myself with the remarks made by the Lord Justice-Clerk and Lord Hunter in the Scottish case of the *Incorporated Glasgow Dental Hospital* v. *Lord Advocate* (1), a case which is really in my opinion indistinguishable from the present.

Appeal allowed.

Solicitors: *Finnis, Downey, Linnell & Chessher.*

W. I. C.

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(1) 1927 S. C. 400, 406.

In re JACKSON.

BEATTIE *v.* MURPHY.

FARWELL J.

1932
Oct. 21.

[1930. J. No. 88.]

Will—Ambiguity—Three Nephews of the Same Name—Illegitimacy—Extrinsic Evidence.

A testatrix devised and bequeathed all her real and personal estate to her trustees upon trust for sale and conversion, and to hold the net proceeds upon trust for her two brothers, two sisters and "my nephew Arthur Murphy" in equal shares.

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The testatrix had three nephews named Arthur Murphy, two of whom were legitimate sons of two of her brothers and the other was an illegitimate son of a sister. One of the legitimate nephews was resident in Australia, but had visited the testatrix on occasions. The other legitimate nephew was resident in England and known to the testatrix, but he was the son of a brother who was given another share of the residuary estate. The illegitimate nephew had married a legitimate niece of the testatrix and was well known to the testatrix, whose affairs he had managed before her death for some time. Questions arose as to which person the testatrix had intended by the words "my nephew Arthur Murphy":—

Held, (1.) that if there had been only the two legitimate nephews it would have been impossible to tell which of them was intended, and the ambiguity would have caused an intestacy;

(2.) that, although as against one legitimate claimant evidence could not be admitted in favour of an illegitimate claimant, the Court was entitled in the circumstances to look at evidence as to the family;

(3.) that if from such evidence it appeared that the testatrix did not intend to describe either of the legitimate nephews, but did intend to describe the illegitimate nephew, the Court could not disregard such evidence;

(4.) that in order to avoid ambiguity the Court was entitled to consider the claim of the illegitimate nephew;

(5.) that on the evidence the person who had married a niece of the testatrix, and so was in a sense a nephew, was clearly intended by the words used in the will; and that the illegitimate nephew took a share of the residuary estate.

In re Fish. Ingham v. *Rayner* [1894] 2 Ch. 83 distinguished.

ADJOURNED SUMMONS.

Mary Jackson, widow, by her will dated September 21, 1921, appointed Adam Beattie and John Henry Mugginson executors and trustees thereof and, after giving certain pecuniary legacies, devised and bequeathed all her real and personal estate unto her trustees upon trust for sale and conversion and upon trust out of the proceeds to pay her funeral and testamentary expenses and debts and the said legacies and to stand possessed of the residue thereof "In trust for my brothers William Murphy and Arthur Murphy my sisters Ellen Skerritt and Jane McPhillips and my nephew Arthur Murphy in equal shares," with a provision that if any of the said five persons should have died in her lifetime leaving issue such issue should take the share that his, her or that parent would have taken if such parent had survived her.

The testatrix made a codicil dated December 24, 1921, whereby she revoked the appointment of John Henry Mugginson as executor and trustee, and appointed Joseph Brown to be an executor and trustee in his place, and in all other respects confirmed her will.

The testatrix died on May 30, 1928, without having otherwise revoked or altered her will, which was proved in the Carlisle District Probate Registry on July 9, 1928, by Adam Beattie and Joseph Brown. Joseph Brown died on January 25, 1930, leaving Adam Beattie him surviving.

At the death of the testatrix it was found that there were three persons who apparently answered the description of "my nephew Arthur Murphy." These were: (1.) Arthur Murphy, a legitimate son of John Murphy, a brother of the testatrix, and is resident in Australia, and is hereinafter called "the Australian Arthur"; (2.) Arthur Murphy, a legitimate son of the testatrix's brother Arthur Murphy, named in the will and resident at Southwaite in Cumberland, and is hereinafter called "the Southwaite Arthur"; and (3.) Arthur Murphy, an illegitimate son of the testatrix's sister Margaret Murphy, who resides in Carlisle, and is hereinafter called "the Carlisle Arthur." None of the three had any Christian name other than Arthur.

It appeared from the evidence that the Australian Arthur had resided in Australia for seventeen years, and had as a boy several times stayed at the house of the testatrix, and had frequently visited her with his father, and had visited her on certain occasions when he came on visits to England. It appeared from the evidence of other members of the family that John Murphy, the father of the Australian Arthur, who was dead, was not on good terms with the testatrix.

It also appeared from the evidence that the Southwaite Arthur was well known to the testatrix and had visited her on several occasions, and that his father Arthur Murphy had died in the testatrix's lifetime, so that the Southwaite Arthur would, under the terms of the will, be entitled to a share of the fifth share of residue bequeathed to his father.

Evidence was tendered and admitted by the Court that the Carlisle Arthur had married Mary Anne Taylor, the daughter of the testatrix's sister Jane McPhillips by her first husband James Taylor, and so was a niece of the testatrix; that the testatrix used to call him her nephew and was called "aunt" by him; and that during the latter part of the testatrix's life he had managed her financial affairs, and at the time of her death, when she was incapable of managing her affairs, he was about to be appointed receiver of her estate. It was also stated that in a previous will made by the testatrix in 1915 she had devised her residuary estate to six persons, one of whom she described as "my nephew Arthur Murphy, son of my sister Margaret Murphy."

In consequence of the difficulty of determining the meaning of the words "my nephew Arthur Murphy" in the testatrix's will, Adam Beattie, the surviving executor and trustee, issued this summons on January 8, 1930, to which the three Arthur Murphys were made defendant and also William Brown, a brother of the testatrix, as representing the next of kin.

L. F. Mumford for the trustee.

A. H. Droop for the Australian Arthur. Where there is a legitimate nephew no evidence as to an illegitimate nephew can be admitted. That is clearly decided by *In re Fish. Ingham* v. *Rayner.* (1) As between the two legitimate

(1) [1894] 2 Ch. 83.

nephews I submit that it is not probable that the testatrix intended to give a share of the residuary estate to the son of her brother Arthur Murphy, to whom she had already given another share. The evidence shows that the testatrix knew of this nephew and had seen him on his visits to England, and I submit that he is the nephew intended.

L. B. Tillard for the Southwaite Arthur. I support the argument by Mr. Droop that the illegitimate nephew cannot take in competition with the legitimate nephews, and I submit that this is clear on *In re Fish. Ingham* v. *Rayner* (1), and no evidence as to intention can be admitted to support his case. As between the legitimate nephews I submit that my client is the one intended by the testatrix, as she hardly knew the Australian Arthur, and there is evidence that there had been a quarrel between her and his father. I submit that the fact that my client's father also was a residuary legatee is no argument against my client being the person intended.

C. J. Parton for the Carlisle Arthur. The law as regards such a case as this is well stated in Wigram on Extrinsic Evidence, 6th Proposition, 5th ed., p. 110. In this case if there had been only one legitimate nephew I could not argue in favour of my client in the face of the decision in *In re Fish.* (1) But the case is different when there are two legitimate nephews. That involves an ambiguity and evidence is admissible as to the meaning of the word "nephew" to the testatrix: see *In re Ofner. Samuel* v. *Ofner* (2) and *Henderson* v. *Henderson.* (3) The Court is entitled to consider not the intention of the testatrix but the meaning to her of the word. The circumstances of the family can be considered. If that be so I submit that it is clear that the testatrix meant my client by the word "nephew." He had married a legitimate niece, and the husband of a niece can be rightly described as a nephew in the same way that the niece of a wife can be described as a testator's niece: *In re Fish.* (1) My

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(1) [1894] 2 Ch. 83.
(2) [1909] 1 Ch. 60.
(3) [1905] 1 I. R. 353.

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client was on intimate terms with the testatrix and had managed her affairs, and there is evidence that in a previous will the testatrix had made him one of her residuary legatees. I submit that, if evidence as to the family can be admitted, it is quite clear that my client was the nephew referred to.

H. C. Graham for the next of kin. I submit that no extrinsic evidence can be admitted to bring in the illegitimate nephew, and that as between the two legitimate nephews there is such an ambiguity that neither of them is clearly intended and there must be an intestacy.

FARWELL J. This summons raises a question of some difficulty, and, having regard to the nature of that question, it is somewhat curious that it is not the subject of any reported case.

The will is a short one, and on the face of it presents no difficulty. The testatrix gave her residuary estate to her two brothers and two sisters and "my nephew Arthur Murphy" in equal shares. Evidence is undoubtedly admissible as to the existence of her brothers and sisters, and whether she had a nephew whose name was Arthur Murphy, and the evidence shows that she had in fact two legitimate nephews, both named Arthur Murphy, each being the son of a brother, and both answer the description exactly. That state of affairs gave rise at once to an ambiguity as to which nephew the testatrix intended to benefit, and in order to solve that problem, evidence as to the state of the family generally is admissible, and I have read this evidence, from which it appears as follows. One of these two nephews lives in Australia and had some communications with his aunt in her lifetime. There is also some evidence of a quarrel between his father and the testatrix, but no weight can be attached to this. Had he been the only legitimate nephew he would undoubtedly have taken. The other legitimate Arthur Murphy lives in this country, and there is evidence

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as to his having been in communication with the testatrix. But he is the son of the testatrix's brother Arthur Murphy, to whom she gave another share of her residuary estate, and it does not seem very likely that she would give a further share to his son.

Now on that evidence alone I should have come to the conclusion that it is impossible to tell which of these two nephews was intended by the testatrix, and had the matter ended there I must have found that there was an intestacy on the ground of uncertainty. But the matter does not end there, because the evidence shows that one of the testatrix's sisters had a son born out of wedlock, who was also named Arthur Murphy, and that he was in close relationship with the testatrix, and had married one of her nieces, and therefore in some sense may be called a nephew. Now in the circumstances what course ought I to adopt? If there had been one legitimate nephew only named Arthur Murphy that nephew would undoubtedly have been entitled to the legacy, and no evidence at all as to the existence of the illegitimate nephew would have been admissible: see Wigram on Extrinsic Evidence, Prop. II. But as soon as it appears from the evidence that there is more than one nephew who exactly answers the description in the will, the Court is entitled to have evidence of the state of the family generally, and to be put to some extent in the position of the testatrix in order to ascertain not what the testatrix intended but what the words which she has used were intended to mean. Now if from that evidence it appears that neither of the legitimate nephews was intended by the words which the testatrix has used, but that the words were used to describe the illegitimate nephew, I am, I think, bound to give effect to that evidence as a whole. I cannot disregard it, and if it convinces me that the testatrix intended by the words "my nephew Arthur Murphy" her illegitimate nephew, in my judgment I must give effect to it.

But it is said that if I hold that the illegitimate nephew is entitled, then an illegitimate person will take

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in preference to a legitimate person and that is not permissible: see *In re Fish.* (1) In my judgment, however, that case has no application here. In that case there was only one legitimate claimant, and consequently no ambiguity; whereas in this case, as I have already pointed out, there is clearly an ambiguity, and I do not understand that decision to mean that in such a case as the present an illegitimate person must necessarily be disregarded.

Looking at the whole of the evidence in this case I can have no doubt that the illegitimate nephew was the person intended to be designated by the words "my nephew Arthur Murphy," and in those circumstances in my judgment I am bound to hold that he is the person entitled to the share of residue, and I will so declare.

Solicitors: *Speechly, Mumford & Craig, for Saul & Lightfoot, Carlisle, for all parties.*

(1) [1894] 2 Ch. 83.

E. K. C.

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J.

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Oct. 21, 22.

In re WILLIAMS.

WILLIAMS *v.* PAROCHIAL CHURCH COUNCIL OF THE PARISH OF ALL SOULS, HASTINGS.

[1931. W. No. 2311.]

Will—Construction—Gift to Husband absolutely—" Knowing that he is fully aware of my intention "—Husband aware of Wife's intention—Enforceable Trust.

A wife by her will gave all her property to her husband absolutely, " knowing that he is fully aware of my intention that at his death all my possessions are to be sold and given to " a certain church. The will further stated that the testatrix was aware of her husband's intention to bestow his possessions at his death on the same church. The will also charged her husband to pay 20*l.* to a dear friend.

The will was in the testatrix's handwriting, but was executed in the presence of two solicitors at an interview at which the husband was present, and at which the terms of the will were discussed in his presence without any objection by him.

The wife predeceased her husband. He made no will after her death and died intestate.

The Parochial Church Council of the named church claimed the wife's property; the husband's next of kin claimed that the husband had taken the property free from any trust or obligation:—

Held, that on the evidence the husband knew the contents of his wife's will and by his silence agreed to carry out her wishes; that it was against the conscience of the husband to take the property for himself, and that a Court of equity would enforce the obligation; and that the Parochial Church Council took the wife's property.

In re Gardner. Huey v. *Cunnington* [1920] 2 Ch. 523 applied.

In re Falkiner. Mead v. *Smith* [1924] 1 Ch. 88 distinguished.

ADJOURNED SUMMONS.

Mrs. Lucy Kate Williams, of Fairview, 18 Dudley Road, Hastings, duly made her will on June 30, 1921, in the following terms: " I give and bequeath everything of which I am possessed or may become entitled to to my dearly loved husband George Arthur Williams absolutely, knowing that he is fully aware of my intention that at his death all my possessions are to be sold and given to All Souls Church, Clive Vale, Hastings, in gratitude for much spiritual help received from the ministrations of its fine clergy, and in admiration of the self denial of its devout congregation. I am aware of my husband's intention to bestow his possession at his death on the same All Souls Church. Perhaps a window in the Lady Chapel might be put up to record our mutual gratitude. I charge my dear husband to pay 20*l.* (twenty pounds) free of legacy duty to my dear friend Mrs. Adelaide Frances Shoesmith (formerly Miss Sands) . . . . as a small token of my everlasting gratitude for her devoted affection to my dear mother and myself. . . . . I appoint my dear husband sole executor of this my last will but if he should be incapacitated from acting as such and be prevented from making a fresh will then I wish that Mr. Alfred Elliott, solicitor, of 3 Cambridge Road, Hastings, will act as executor in place of my husband to this my will and also for my husband in seeing that our mutual wishes respecting our properties passing at the death of us both to the benefit of All Souls Church are carried out."

The testatrix died on June 3, 1926, without having revoked her will, which was proved on July 6, 1926, in the Lewes District Probate Registry by her husband, George Arthur Williams, who had survived her. George Arthur Williams had made his will on June 30, 1921, the same day on which his wife made her will, and thereby gave and bequeathed all that he possessed and all to which he might become entitled to his said wife, whom he appointed his sole executrix.

George Arthur Williams died on November 24, 1930, without having revoked or altered his said will. Letters, of administration to his estate, with the said will annexed, were granted out of the Lewes District Probate Registry on March 26, 1931, to his sister Emily Janet Charlotte Church Williams, and on May 22, 1931, letters of administration de bonis non to the estate of the said Lucy Kate Williams, with her will annexed, were granted to the said Emily Janet Charlotte Church Williams.

Upon the death of the said George Arthur Williams questions arose as to who were entitled to the estate of the said Lucy Kate Williams remaining in the hands of the said George Arthur Williams at his death. His next of kin claimed that upon his wife's death he became entitled absolutely to her estate, subject to the payment of the legacy of 20*l.* given by her will, and free from any trust or obligation for the benefit of All Souls Church, Clive Vale, Hastings. The Parochial Church Council of the parish of All Souls claimed that there was a trust or obligation in favour of the church, subject to the life interest of the husband, and that they were entitled to the estate of Lucy Kate Williams.

Emily Janet Charlotte Church Williams, as personal representative of both Lucy Kate Williams and George Arthur Williams, issued this summons, to which the Parochial Church Council, the Attorney-General and the next of kin of George Arthur Williams were defendants, asking whether she, as the personal representative of George Arthur Williams, became on his death absolutely entitled to the estate of Lucy Kate Williams, or whether the Parochial Church Council became entitled to such estate, and whether by any secret trust that bound George Arthur Williams, or how otherwise.

Evidence was given by Alfred Meadows Elliott and Charles Francis Harding, solicitors at Hastings, at whose office the wills of both Kate Lucy Williams and George Arthur Williams were executed, and who witnessed both wills, as to the circumstances of their execution. From this it appeared that the wife and husband attended the office with their wills already drawn in their respective handwriting for the purpose of the execution being properly carried out. Lucy Kate Williams declined any advice as to the terms of her will, saying that she was satisfied with the form in which it was drawn. George Arthur Williams was present at the interview and heard all the conversation, and in the opinion of both the solicitors was well aware of the terms of his wife's will, and said nothing to express any disapproval. The facts as to the interview at which the will was signed are fully discussed in the judgment.

G. G. Solomon for the plaintiff.

T. R. Colquhoun Dill for the Parochial Church Council. The intention of the testatrix appears clearly from the terms of her will. She desired that after her husband's death her property should go for the benefit of the church, and she intended to place upon her husband the obligation of carrying this out. It appears from the evidence of the solicitors that the husband was well aware of the terms of the will and of the obligation imposed upon him, and a Court of equity will hold that the obligation was imposed upon his conscience, and as he did not discharge it the Court will do so. This case differs from *McCormick* v. *Grogan* (1), as in that case it was not shown that the legatee knew of the wishes of the testator before or at the time of the execution of the will or ever accepted the obligation. The conduct of the legatee has been held to be equivalent to an undertaking or promise on his part that he will carry out the testator's intention: *McCormick* v. *Grogan.* (1)

In *French* v. *French* (2) and *Blackwell* v. *Blackwell* (3) the House of Lords, and in *In re Gardner. Huey* v. *Cunnington* (4) the Court of Appeal, have held that where the legatee had knowledge of the terms of the gift he was bound by those terms.

I submit that clearly the Parochial Church Council which represents All Souls Church is entitled to this property. The Parochial Church Councils (Powers) Measure, 1921, shows that the Council is entitled to take and hold the property.

Stafford Crossman for the Attorney-General. I support the contention of Mr. Dill, and say that this is a charitable bequest for which a scheme must be framed.

L. F. Potts for the next of kin. I claim that the husband took the property absolutely free from any trust, and that on his intestacy the next of kin became entitled. Two questions arise: (1.) Did the will create any valid trust? and (2.) Even if so, was any trust imposed upon the husband? The evidence does not show that the husband had any knowledge of the contents of the will beyond the gift to himself, nor, even if he had such knowledge, that he assented to them. I submit that he only assented to the gift to himself, and

(1) (1869) L. R. 4 H. L. 82, 89.
(2) [1902] 1 I. R. 224.
(3) [1929] A. C. 318.
(4) [1920] 2 Ch. 523.

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that there is no evidence that he agreed to carry out any trust. This case differs from the cases cited in that here the intention of the testatrix is set out in the will itself, and there can be no question of a secret trust. In *In re Huxtable. Huxtable* v. *Crawfurd* (1) and *In re Falkiner. Mead* v. *Smith* (2) it was held that no obligation had been created. The latter case is especially strong in my favour. Again, on the construction of the words of the will I submit that here there is an absolute gift to the husband, and there is nothing in what follows to take it away: see *In re Williams. Williams* v. *Williams* (3) and *In re Conolly. Conolly* v. *Conolly.* (4) The last words of the will are in favour of my contention. I submit that the will does not create a trust, and there is no evidence that the husband undertook to carry out any trust.

T. R. Colquhoun Dill in reply. There is no question of contradicting the will, as all the terms of the intention of the testatrix are contained in the will. In *In re Falkiner* (2) there was an express direction that no trust was to be created. This case is directly within the decision in *McCormick* v. *Grogan* (5), and the Court will carry out the testatrix's intention and give her property to the Parochial Church Council.

FARWELL J. [after stating the parties and facts and reading the will, continued:] The circumstances under which the will of the lady was executed appear in a joint affidavit made by Mr. Elliott and Mr. Harding, solicitors at Hastings.

It appears that on June 20, 1921, Mr. and Mrs. Williams went to the office of the solicitors, and they saw in the first instance Mr. Elliott. The lady appears to have been the spokeswoman of the party, the husband not taking a very active part in the proceedings. The lady produced her will and stated its contents; then the solicitor read the will, which he saw was in her handwriting; it was unsigned. She said, and this was said in clear language in the presence of her husband, that it was the wish of herself and her husband that both of their estates should ultimately go to this particular church. She referred to the intention expressed in her will, and discussed its contents with the solicitor. The husband was present at the whole of the interview, and heard what took place. The solicitor thereupon, not unnaturally, asked the lady whether she desired to consult him as to the form of her will, but she was content with her own efforts at draftsmanship, and refused any assistance from him on that score, explaining that she was only anxious to ensure that it was properly executed, and that that was the reason why she and her husband were at the office. The solicitor pointed out that he felt some doubt about the effect of the will as it stood, but she was quite content with it, and the will was left as drawn by her. It appears that the husband had also gone to the solicitors' office with his will in his pocket; he also produced that will, which was perused by the solicitor, and ultimately Mr. Elliott sent for his partner, Mr. Harding, to whom the whole matter was explained, and both wills were executed in the presence of the two solicitors. The wife, as I have already said, predeceased her husband, so that on the lady's death the husband went into possession of her property. He died in 1930, having given by his will the whole of his property to his wife, who predeceased him, with the result that he died intestate.

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(1) [1902] 2 Ch. 793.
(2) [1924] 1 Ch. 88.
(3) [1897] 2 Ch. 12.
(4) [1910] 1 Ch. 219.
(5) L. R. 4 H. L. 82.

I think that it is necessary to state quite shortly what in my judgment is the effect of the evidence to which I have referred, but before doing so there is another affidavit to which I should make a short reference, an affidavit by the plaintiff in these proceedings. It appears from her evidence that in 1921 or thereabouts the testatrix and her husband asked her to witness the signatures to their wills, which she did, but apparently the spouses, or one of them, had some doubt as to the propriety of the form of execution, and it was for this reason that the solicitors were consulted. The plaintiff goes on to say: "Some time subsequent to this I remember that one of them, I think it was my said brother (i.e., the husband), informed me that they had seen Mr. Elliott,

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and that he and his partner had witnessed the wills. I did not know the contents of either will. A short time after the death of my said sister-in-law Lucy Kate Williams on June 3, 1926, my said brother discussed the contents of her will with me, and there is no doubt in my mind, from what he said to me then, that he intended to carry out his wife's wishes as expressed in her will, so far as her estate was concerned, and that he considered it a moral obligation so to do." This evidence in my judgment does not afford me much assistance, and the important evidence is that of the solicitors. The result of that evidence, in my judgment, is that the contents of his wife's will were known to the husband before he attended at the solicitors' office. I think that both these wills had been discussed by the spouses, and that prior to the visit to the solicitors the husband had agreed to carry out his wife's wishes. So far no doubt that is largely a matter of inference, but even if the evidence was not sufficient to establish this, it is quite clear that the husband was present at the solicitors' office; that he undoubtedly knew at that meeting what the contents of his wife's will were; that he undoubtedly knew that his wife's desire was that at his death her property should go in the particular way which she indicated; and by his silence he must be taken, in my judgment, to have agreed, not merely to be bound by the terms of his wife's will, or to give effect to the dispositions of it, but he must be taken to have agreed to carry out his wife's wishes.

Now, if that be the true effect of the evidence, it is said on behalf of the Parochial Church Council that this case comes exactly within the principle of such authorities as *McCormick* v. *Grogan* (1) and the more recent case of *In re Gardner* (2), and other similar cases. The principle of those cases is well settled, and is this, that if a person permits his property to go undisposed of to his heir at law or next of kin, or makes a will leaving his property to a particular person, on the faith of an understanding or promise by the beneficiary to deal with the property in a particular way, then, if the beneficiary takes the property, that promise or agreement is an obligation which is binding upon his conscience, and if he fails to give effect to the promise, or to the agreement, a Court of equity will enforce the obligation, and see that the promise is carried into effect, because it is against conscience for the beneficiary to take the property, and disregard the obligation. This principle, it is said, is applicable to the present case. Here it is said the husband by his silence in the solicitors' office agreed to carry out the wishes of his wife with regard to the disposal of her property after his death, and since he failed to do so this Court will now give effect to them. On the other hand, Mr. Potts, on behalf of the next of kin, says that this is not a case in which the principle can be applied at all: that this case differs from such cases as *In re Gardner* (1), in that the wishes of the testatrix are stated in the will itself. In *In re Gardner* (1), and the other cases to which I have been referred, the trust was in the nature of a secret trust, that is to say the gift in the will was a gift to a person apparently for his own use and benefit, and the obligation imposed by the testator was imposed outside the will altogether. Here the will itself states what the wishes of the testatrix are, and it is said that there is no room for the application of the principle of *In re Gardner* (1) and that class of case. It is further contended that the will itself gives the property to the husband absolutely, and that on its true construction no trust is created; that it is an absolute gift, and nothing more than a superadded expression of a wish; and that to admit evidence to show the existence of a binding agreement, which would be given effect to as a trust outside the will, is to permit evidence to be given to contradict the will, and that no such evidence is admissible.

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(1) L. R. 4 H. L. 82.

(2) [1920] 1 Ch. 501.

Neither of these contentions is in my judgment well founded. Such cases as *In re Gardner* (1) in my judgment are authorities for the proposition that evidence is admissible to prove the existence of an agreement or promise to give effect to the testator's wishes, notwithstanding that the gift in the will to the legatee is in terms absolute. In my judgment therefore, so far as Mr. Potts' argument is based upon the suggestion that there is an absolute gift in the will, and that no evidence of an agreement is admissible, it cannot be supported.

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(1) [1920] 1 Ch. 501.

With regard to the other contention, that is, I think, based upon the decision in *In re Falkiner.* (1) In my judgment that case does not apply to the present one. In that case the facts were somewhat unusual, and the true explanation of the decision is that Tomlin J. came to the conclusion that all that the beneficiary had promised or undertaken to do was to give effect to the dispositions contained in the will, and since the will contained the most express and definite statement that there was to be no trust imposed upon the beneficiary, there was no room for any binding obligation.

Now, in the present case, assuming that on the true construction of the will no express trust is created, there is certainly no express provision, as there was in *In re Falkiner* (1) that the legatee was to be under no obligation as to how he dealt with the property, and if the evidence establishes that there was a promise or an agreement by the husband that the property when he got it should go at his death to the defendant Council, then in my judgment he took the property burdened with that obligation, and it is an obligation which the Court will enforce, and since, in my judgment, the evidence does establish the existence of such a promise, it follows that, the husband having died without having taken steps to ensure that his promise should be carried out, this Court will now give effect to that promise by declaring that the property of the wife to which the husband was entitled under the will belongs to the Parochial Council in question.

But before I make that declaration, I think that, having regard to the argument addressed to me by Mr. Potts, it is right that I should say this. I am by no means satisfied that this will does not on its true construction create a trust, and in saying that I am not

(1) [1924] 1 Ch. 88.

in the least forgetting such cases as *In re Williams* (1) and *In re Conolly* (2) and other cases to which I was referred. In all these cases the question is one of the true construction of the particular words which the testator or testatrix has used. Mr. Potts has laid great stress on the fact that the property is given to the husband absolutely, and he says that the mere expression of a belief that the husband will give effect to her wishes is insufficient to impose a trust. That argument would have much more force if the latter part of the will had been omitted, but I find in the latter part of the will that the testatrix expresses herself in these most emphatic words: "I charge my dear husband to pay 20*l.* free of legacy duty to my dear friend Mrs. Adelaide Francis Shoesmith." Now, the words "I charge my husband to pay the sum" are wholly inconsistent with the mere expression of a wish. That in itself must, in my judgment, create a trust, which could be enforced if the husband failed to pay to the lady her legacy. If that be the true effect of those words, they largely discount the effect of the word "absolutely" in the gift to the husband, because, although the husband is given the property in terms absolutely, he is charged to do something with a portion of it. In my judgment, those words alone are sufficient to indicate that the word "absolutely" cannot be read without some qualification, and this, coupled with the proviso in the last part of the will, that in the event of her husband not being able to carry out her wishes to benefit the defendant Council then some one else is to take up the burden, and to see that the property goes as she desires, seems to me to point very strongly to the conclusion that the true effect of the testatrix's will is not an absolute gift to her husband subject to a mere expression of desire as to how the property is to go after his death, but that it is a gift to the husband for life, with a trust to dispose of the property after his death in the way she has indicated. It is not, however, necessary for me to determine this question in the view which I take of the case on other grounds. I propose in the circumstances to make a declaration that the

(1) [1897] 2 Ch. 12.

(2) [1910] 1 Ch. 219.

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defendants, the Parochial Council, are entitled to the whole estate of the testatrix.

Solicitors: *Savage Cooper & Wright, for Elliott & Harding, Hastings; Treasury Solicitor; Tamplin & Co., for Davenport Jones & Glenister, Hastings.*

E. K. C.

EVE J.
1932
Oct. 18, 19; *Nov.* 23.

In re HANLON.

HEADS *v.* HANLON.

[1932. H. 1246.]

Will—Construction—Vested Interest in Remainder—Proviso for Defeasance in certain Events—Condition against Marriage or other Association with Person named in Will—No Gift Over on Breach of Condition—Validity—Certainty.

A testator devised and bequeathed one moiety of his residuary estate upon trust for conversion and investment and to pay the income to his wife during her life or widowhood, and subject thereto in trust for his two children named, a son and a daughter, in equal shares, but subject to a proviso in the case of the daughter that if she should intermarry with A. B. or live with him as his wife, or leave home with the intention of living with him or misconduct herself with him, or be delivered of a child or children of whom the said A. B. should be the father, then in any of those events any devise or bequest either residuary or otherwise under the testator's will should be absolutely void and forfeited, and the daughter should be deemed to have died in his lifetime as a single woman. There was no gift over of the daughter's share upon any forfeiture for breach of the conditions:—

Held, that the conditions were not void for uncertainty, or as being in terrorem, for if a testator desires and expressly intends a gift to be revoked the absence of a gift over will not prevent the revocation from taking effect, and moreover the doctrine of in terrorem is only applicable to conditions in restraint of marriage and against disputing a will.

Held, therefore, that there was an intestacy as to the daughter's share, and the next of kin, being all sui juris, could agree so as to defeat the proviso.

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ADJOURNED SUMMONS.

By his will dated April 24, 1928, the testator, Thomas Hanlon, bequeathed his residuary personalty and devised the whole of his realty upon trust for sale and investment of the proceeds, and directed his trustees to hold one moiety of his trust funds upon trust to pay the income thereof to his wife during her life or widowhood, and on her decease or remarriage upon trust for his children, Thomas Hanlon the younger and Maisie Hanlon, who should attain the age of twenty-one years or marry under that age in equal shares, but subject to the following proviso—namely, that if Maisie Hanlon should intermarry with a certain person named in the will, (hereinafter referred to as A. B.), or should live with him as his wife, although not married to him, or should misconduct herself with him in any manner, or should leave home with the intention of living with him, or should be delivered of a child or children of whom the said A. B. should be the father, then in any of those events the devise or bequest to Maisie should be absolutely forfeited and void, and she should be deemed to have died in the testator's lifetime as a single woman. The will also contained two provisoes containing gifts over of the shares of Thomas and Maisie, in the event of the death of either of them before the testator, leaving issue living at his death, to such issue but excluding any possible issue of Maisie Hanlon by A. B. The will did not provide for the possible contingency of Thomas and Maisie both predeceasing the testator, and one of them leaving issue but the other no issue. There was also no gift over of Maisie's share in the event of the condition above referred to taking effect.

The testator died on December 22, 1931, and his will was duly proved by the executors therein named. The plaintiffs, as the trustees, took out this summons for the determination of the question whether the above condition of defeasance was valid, or whether it was void for uncertainty, or as being in terrorem or for any other reason. Both Thomas Hanlon junior and Maisie Hanlon attained twenty-one and survived the testator, and Thomas was married and had one child, a daughter. There was evidence that A. B. was married and had left the district where the testator lived, and that Maisie had not seen him for some years.

F. B. Alcock for the trustees.

Leonard Stone for the defendant Maisie Hanlon. The clause is invalid for uncertainty: *In re Sandbrook.* (1) There are five different prohibitions, of which two may be clear, but the remainder are too uncertain for any one to be able to say whether or not they have occurred.

Again the gift over must fit the condition, and if the words used are not exactly apt to fit the condition, the defeasance clause will be ineffective and the gift will be absolute: *In re Catt's Trusts* (2); *Rochford* v. *Hackman.* (3)

In order that the forfeiture clause may be valid there must be an effective gift over, but here all the events on which it is made to depend, predeceasing the wife, etc., must all take effect; therefore the children have absolutely vested interests in the trust fund. There is nothing to fit the situation which has arisen.

If the proviso is operative on the daughter doing any of the things mentioned, then it forfeits the son's share as well.

The widow, who is still living, desires to support the daughter's contention that the forfeiture clause is void.

The condition is merely a condition in terrorem, and is invalid in the absence of an effective gift over.

[He also referred to *Musgrave* v. *Brooke* (4) and to Jarman on Wills, 7th ed., pp. 1442, 1496, 1500.]

E. M. Winterbotham for Agnes Hanlon, the infant daughter of Thomas Hanlon the younger.

If there were no question of forfeiture, there could not be any serious doubt how the will should be read. There is a substitution of the issue of children if they should die in the lifetime of the testator leaving issue living at his death, but the testator has left out the possible case of one child dying leaving, and the other dying not leaving, issue in his lifetime. The words "at that date" cannot refer

(1) [1912] 2 Ch. 471.
(2) (1864) 2 H. & M. 46.
(3) (1852) 9 Hare, 475, 480.
(4) (1884) 26 Ch. D. 792.

to the date of the death of the testator, and it can only be the date of the event causing forfeiture. The clause provides not for one compound event, but for three possible events.

Once she is in possession, I admit that Maisie would be entitled to the income of her share until a forfeiture should occur.

As to uncertainty, if one event is clearly defined and happens, then the forfeiture occurs. The fact that one or more of the conditions is uncertain will not make all the conditions bad: *In re Sandbrook.* (1) In *Clavering* v. *Ellison* (2) Lord Campbell L.C. held that though one condition in a will might be too vague to be enforced another might be valid, and a gift over take effect on breach of either. It is still possible, however unlikely, that the testator's daughter Maisie may marry A. B., and if so the proviso takes effect. As to the other conditions, difficulty of proof may exist, but that is not the same thing as uncertainty. "Misconduct" with the person named is quite definite: it means being treated by him as his mistress.

A condition in restraint of marriage with a particular person is certain and valid: *In re Bathe* (3); *Jenner* v. *Turner.* (4) A condition against marriage with a person of a particular class, such as a blood relation, is valid, at any rate, not void for uncertainty: *In re Lanyon.* (5)

It is said that there must be a gift over, as a mere forfeiture is insufficient. But the question is what it was that the testator meant, and here he clearly intended a forfeiture: *Jeffreys* v. *Jeffreys.* (6) Even as regards personal estate, a condition in terrorem is valid unless it is in general restraint of marriage. There is no authority for the proposition that a condition in partial restraint of marriage is invalid without a gift over.

The decision in *In re Catt's Trusts* (7) only came to this, that the learned judge was uncertain what the gift over was intended to be.

(1) [1912] 2 Ch. 471.
(2) (1859) 7 H. L. C. 707.
(3) [1925] Ch. 377.
(4) (1880) 16 Ch. D. 188.
(5) [1927] 2 Ch. 264, 268.
(6) (1901) 84 L. T. 417.
(7) [1864] 2 H. & M. 46.

This forfeiture takes effect in any one of the events named in the will, all of which are sufficiently clear to enable the Court to say what they mean.

G. R. Younger for the testator's widow.

Leonard Stone replied.

Cur. adv. vult.

Nov. 23. EVE J. The summons in this case raises the question whether a clause of defeasance contained in the will of the testator, who died on December 22, 1931, affecting the share of the respondent, Maisie Hanlon, in the testator's residuary estate is effective, or purely in terrorem, or void either for uncertainty or otherwise.

By his will, which is dated April 24, 1928, the testator bequeathed and devised his residuary personalty and the whole of his realty to his trustees upon trust for conversion and investment of the proceeds, and declared that the trustees should stand possessed of the trust funds as to one moiety thereof for his wife absolutely, and as to the other moiety upon trust to pay the income thereof to his wife during her life or widowhood, and on her decease or remarriage upon trust for his children, Thomas Hanlon the younger, and Maisie Hanlon, who should attain twenty-one, or, being female, should marry under that age, in equal shares, subject, nevertheless, to the proviso as to the said Maisie Hanlon thereinafter mentioned. Then follows the proviso, which I will read without disclosing the name or address of the individual against whom it is pointed: "Provided always that if my said child Maisie Hanlon shall intermarry with" A. B., of etc., etc., "or shall live with him as his wife although not married or shall leave home with the intention of living with him or shall misconduct herself with him in any manner or shall be delivered of a child or children of whom the said A. B. shall be the father then in any of the events before recited any devise or bequest either residuary or otherwise under this my will to the said Maisie Hanlon shall be absolutely void and forfeited and she shall be deemed to have died in my lifetime as a single woman." Then follow two provisoes, which do not exhaust all possible contingencies, but which I need not read, as neither of them can become operative, the testator's children having both survived him and attained vested interests.

What I have to deal with is a vested interest in remainder expectant on the death of the widow in a share of a mixed fund representing residue, subject to a clause of defeasance whereby on breach of any of the conditions specified the devise or bequest is to be absolutely void, and the beneficiary is to be deemed to have died in the testator's lifetime a single woman, in which case there would be an intestacy as regards her share On her behalf it has been argued that the conditions are bad on the ground of uncertainty, or, alternatively, ought to be treated as in terrorem, and therefore void in the absence of a gift over It is not disputed that conditions subsequent intended to defeat a vested interest are always construed strictly so that if the estate or interest is to be defeated it must be by clear and express terms, and to work a forfeiture there must be shown a breach of a defined line of conduct which the parties concerned must reasonably have known would work a forfeiture: see *Egerton* v. *Earl Brownlow* (1) and *Clavering* v. *Ellison*. (2) In the latter case, Lord Cranworth says: "I consider that, from the earliest times, one of the cardinal rules on the subject has been this: that where a vested estate is to be defeated by a condition or a contingency that is to happen afterwards, that condition must be such that the Court can see from the beginning, precisely and distinctly, upon the happening of what event it was that the preceding vested estate was to determine."

Bearing these weighty authorities in mind, I do not think that I should be warranted in holding any of these conditions void for uncertainty. In my opinion they indicate distinctly upon the happening of what event the interest is to determine—marriage, cohabitation, departure from home with intent to cohabit, or sexual misconduct with the named

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(1) (1853) 4 H. L. C. 1, 208.

(2) 7 H. L. C. 707, 721, 725.

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individual, or the bearing of a child of whom he is the father. Proof of breach, it is true, might be more difficult in the case of some of the conditions than others; for example, the paternity of an illegitimate child might be far more difficult to establish than the marriage or cohabitation of the parties, but this would not justify a finding that the line of the conditions is less precise or distinct than the first two. They are all there expressed in terms clearly showing a defined line of conduct which the parties concerned must reasonably know will work a forfeiture.

Then, it is said, there being no gift over in the will on breach, the doctrine of in terrorem is applicable, and the conditions must be treated as ineffective and void. This doctrine applies to cases where the subject of the gift is personalty, or a mixed fund representing the proceeds of sale of real estate and personalty (see *Lloyd* v. *Lloyd* (1), *Bellairs* v. *Bellairs* (2) and *Duddy* v. *Gresham* (3)), and would, prima facie, be applicable here, but it would seem, from Wood V.-C.'s judgment in *In re Catt's Trusts* (4), that if a testator desires a gift to be revoked the mere fact that there is no gift over will not prevent the revocation taking effect. On the construction of the will before me it is, I think, clear that the testator intended the gift to his daughter to be revoked on breach of any of the conditions, and if this is right the absence of any gift over cannot be material here.

But this is not the real difficulty in her way. What she cannot get over is that the in terrorem doctrine applies only to conditions relating to marriage and disputing the will; it does not affect the other conditions to which she is subjected, and, in my opinion, so long as A. B. is living the trustees cannot be authorized to make over to Miss Hanlon her share of the residue. I therefore answer the second paragraph of question 1 in the negative, and the costs must, I think, be raised and paid out of Maisie Hanlon's quarter of the residue. Of course that does not prevent the next of kin agreeing, if they can do so, to an immediate distribution. They are the only persons interested in it.

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(1) (1852) 2 Sim. (N. S.) 255.

(2) (1874) L. R. 18 Eq. 510.

(3) (1878) 2 L. R. (Ir.) 442.

(4) 2 H. & M. 46.

Solicitors: *Doyle, Devonshire & Co. for Hannay & Hannay, South Shields; The Official Solicitor.*

H. L. L.

In re WILLIAM C. LEITCH BROTHERS, LIMITED (No. 2).

EVE J.
1932
Nov. 17, 24.

[005 of 1930.]

MANCHESTER DISTRICT REGISTRY.

Company—Winding-up—Fraudulent Trading by Director—Declaration of Liability—Recovery of Moneys from Director—Application of Moneys recovered—Companies Act, 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *ss.* 156, 275.

By s. 275, sub-s. 1, of the Companies Act, 1929, if it appears in the winding-up of a company that any business of the company has been carried on with intent to defraud creditors of the company or for any fraudulent purpose, the Court on the application of the official receiver, or the liquidator or any creditor or contributory of the company may, if it thinks proper so to do, declare that any of the directors, whether past or present, of the company who were knowingly parties to the carrying on of the business in manner aforesaid shall be personally responsible without any limitation of liability for all or any of the debts or other liabilities of the company as the Court may direct.

A declaration having been made by the Court in the course of the winding-up of a company, that W. C. L., a governing director of the company, had been knowingly a party to carrying on the company's business with intent to defraud creditors between certain dates, fixing the liability of the director at 6000*l.*, and charging a debenture for 4000*l.* issued to the director with that liability, the liquidator recovered the sum of 3356*l.* from the director in respect of the declaration, and asked for directions as to the application of that sum, and any further sum he might recover under the judgment, among the creditors of the company:—

Held, that the moneys so recovered and to be recovered were not to be exclusively applied for the benefit of creditors whose debts were contracted during the period when the business of the company was carried on with intent to defraud creditors, but formed part of the general assets of the company available for all the creditors, on the same principle as that applicable to moneys recovered from "B" contributories.

Principle of *Webb* v. *Whiffin* (1872) L. R. 5 H. L. 711 applied.

SUMMONS IN WINDING-UP.

The summons was taken out by the liquidator of the company for directions as to the application of any moneys coming to his hands in respect of a sum of 6000*l.*, for which he recovered judgment against W. C. Leitch, the governing director of the company, under a declaration by Maugham J., by virtue of s. 275 of the Companies Act, 1929, on April 8, 1932.

The case before Maugham J. is reported at [1932] 2 Ch. 71, where the facts are fully stated. The liquidator had recovered 3356*l.* in respect of the declaration up to the present time, and asked for directions as to this amount and any further sum which he might recover in future.

John Bennett for the liquidator.

Allan Walmsley for creditors whose claims matured before March 1, 1930. The liability arising under s. 275 is a liability to the company, and not to any individual creditors, in whatever form the declaration may have been made. Sub-s. (*b*) shows that there can only be one liability, making a final judgment within the Bankruptcy Act, 1914. The only creditor who could issue a bankruptcy notice against the debtor is the company. The effect of the declaration made by Maugham J. was that there was a judgment against the director for a definite sum of 6000*l.*, and a charge is created for this amount on any moneys owing by the company to the director.

Therefore any money received by the liquidator is part of the general assets of the company in the winding-up, subject to the special preferences created by the Companies Act, 1929.

A member is protected from the debt of the company by the principle of limited liability (see s. 157), and s. 275 removes the limit of liability in the particular case of a fraudulent director. Under s. 247 the property of the company is to be applied in satisfaction of its liabilities pari passu. If it were not so, the effect of s. 275 would be to create a special class of preferential creditors.

The same principle applies as in the case of contributories. When they have become liable to contribute to the assets of a company, whatever they contribute becomes part of the general assets of the company, and cannot be appropriated to meet any particular class of debts: *Webb* v. *Whiffin.* (1)

R. A. Forrester for creditors whose debts were incurred between March 1, 1930, and the date of winding-up. The section is not directed to the rights of creditors, but to the redress of the company's position. The object of the section is to make a director who is responsible for fraudulent trading personally liable for all or any of the debts and liabilities of the company. The section creates an indemnity. There are two liabilities involved: (1.) a liability of the director who has been a party to fraudulent trading to indemnify the company, and (2.) a liability of the company to the defrauded creditors.

It is not only the creditors of the company but of any other person who may be defrauded, but it is not necessary under the section to prove that any particular creditor has been defrauded.

If the money obtained under this section is not applied in payment of defrauded creditors, then the director will still be personally liable for the fraud, and he will continue to be so until the company has paid twenty shillings in the pound.

It is suggested that upon this construction of the section the result is to give a preference in the distribution to defrauded creditors. Assuming that is so, that is not unfair. The ordinary creditors who have not been defrauded have simply faced a commercial risk. From the point of view of general equity, there is no reason why the Court should not apply this construction.

[Eve J. Here it would mean that the defrauded creditors would get a dividend, and the other creditors would get nothing.]

It was argued that being a liability of the director to the company it was a liability like that of a contributory. But if, as I submit, it is not a liability to contribute to the assets at all, the question of distribution does not arise. It is not the liability of a contributory as a member of the company, but the liability of a dishonest agent. It is difficult to draw any analogy between ss. 157 and 265, and, therefore, *Webb* v. *Whiffin* (1) does not apply.

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(1) L. R. 5 H. L. 711.

[He referred to *In re City of London Insurance Co.* (2)]

Cur. adv. vult.

Nov. 24. Eve J. This is an application by the liquidator of William C. Leitch Brothers, Ld., for directions as to the application of any moneys coming to his hands in respect of a sum of 6000*l.*, for which he recovered judgment against the respondent William Cleghorn Leitch, on April 8, 1932.

The judgment was founded on a declaration made under s. 275 of the Companies Act, 1929, that the respondent, a director of the company, having been knowingly a party to the carrying on of the business of the company with intent to defraud the creditors of the company, was personally liable without any limitation of liability in respect of the sum of 6000*l.*, being a part of the debts or other liabilities of the company, and it was thereby ordered that the respondent should, within four days after service upon him of that order, pay to the applicant as liquidator of the company the sum of 6000*l.* And it was further declared that the liability of the respondent for the said sum of 6000*l.* under the declaration thereinbefore contained was a charge upon the debenture for 4000*l.* and interest at 6 per cent. per annum given by the company to the respondent on January 15, 1927, and upon all principal moneys due and owing upon the security of the said debenture, but such charge was to be without prejudice to the rights of creditors or classes of creditors inter se in the division of the moneys recovered under that order from the respondent or from the said charge upon the said debenture. And it was ordered that the applicant as such liquidator should deal with the said sum of 6000*l.* or such part thereof as he might recover in such manner as he might be ordered by the Court.

(1) L. R. 5 H. L. 711.

(2) [1932] 1 Ch. 226.

The company was incorporated in December, 1926, and in June, 1930, was ordered to be wound up compulsorily on a petition presented on May 21, 1930. The respondent was a director of the company throughout and, after a trial which lasted the greater part of four days, my brother Maugham found as a fact that during the months from March 1, 1930, the company was carrying on business with intent to defraud the creditors, and that it was so carrying on business to the knowledge and, indeed, under the direction of the respondent. He accordingly made the order I have stated, and the liquidator, having recovered some 3356*l.* on account of the 6000*l.*, now requires directions as to how he ought to deal with the moneys in hand and anything further he may recover. The substantial question is whether they form part of the general assets of the company available for all the creditors, or whether they ought to be exclusively applied for any restricted class of creditors, and in particular for creditors with whom debts were contracted during the period when the business was being carried on with intent to defraud. Representative creditors with whom debts were contracted before and after March 1, 1930, have been made respondents to this application and have appeared and supported their respective contentions.

On behalf of the latter, it has been urged that whereas the creditors prior to the fraudulent trading took a fair commercial risk in giving credit to the company, those who executed orders after March 1, 1930, were ex hypothesi defrauded of their money, and that according to its true construction this order ought to be treated as one adjusting the rights of these two classes of creditors inter se; that the effect of the declaration is to make the fraudulent director indemnify the company against an indebtedness to the amount of the declaration and to create a direct liability for a similar amount between him and the defrauded creditors. In support of this contention, reliance is placed on the fact that any creditor of the company may apply for the declaration, but there is nothing in this, for a contributory may also apply; but in both cases the making of any declaration would leave the applicant a trustee for the company or for an unascertained body of creditors.

I do not think the section can properly be construed as one for adjusting the rights of the creditors inter se. Such a construction involves too many difficulties, more particularly under sub-s. 2. The section, no doubt, presents difficulties, but in approaching its construction it is to be noted that it is one of a group of sections—271 to 277—dealing with offences antecedent to or in the course of the winding-up. It can only be brought into operation in the course of a winding-up, and in cases where there is prima facie evidence of the company's business having been carried on for fraudulent purposes. It is not a section which regulates the procedure of an ordinary winding-up or controls the administration of the assets of the company. It is directed solely to the particular offence of fraudulent trading and to attaching personal responsibility therefor to directors who knowingly have been parties thereto. It imposes a liability, but it does not purport to create any new rights for the creditors. It cannot, in my opinion, be regarded as a section involving any departure from the general scheme of all modes of winding-up (s. 156), that is to say, a pari passu distribution of the assets. It may well be that the liability it imposes is measured by the debts of the defrauded creditors. But this is not of itself a ground for holding that the ordinary rules of equality are to be disregarded and a preference created in favour of the defrauded class. The position is, in my opinion, in all respects analogous to that of the "B" contributories. Their liability to contribute is fixed by the amount of indebtedness existing at the time when they respectively ceased to be members, but their contributions are not applicable exclusively to the discharge of that indebtedness, but form part of the general assets of the company for the payment of all the creditors: *Webb* v. *Whiffin.* (1)

The conclusion I arrive at is that all moneys recovered by the liquidator under the declaration of April 8 ought to

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(1) L. R. 5 H. L. 711.

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William C. Leitch Brothers, Ld. (No. 2), *In re.*

be dealt with by the applicant as general assets and applied accordingly.

The costs of all parties will be taxed as between solicitor and client and paid and retained out of the assets.

Solicitors for all parties : *Bernard Kuit & Co., Manchester.*

H. L. L.

FARWELL J.
1932
Nov. 16.

In re CLERGY ORPHAN CORPORATION TRUSTS.

CLERGY ORPHAN CORPORATION *v.* CHRISTOPHER.

[1932. C. 2036.]

Charity—Charitable Society incorporated by Act of Parliament of 1809—*Object of Charity—Maintenance and Education of poor Orphans of Clergymen of the Church of England—Welsh Disestablishment Acts—Power of Charity to Maintain and Educate poor Orphans of Clergymen in Wales and Monmouthshire—Act of* 1809 (49 *Geo.* 3, *c.* 18)—*Welsh Church Act,* 1914 (4 *&* 5 *Geo.* 5, *c.* 91), *ss.* 1, 2, *sub-s.* 1; *s.* 3, *sub-s.* 2; *s.* 38, *sub-s.* 3—*Welsh Church* (*Temporalities*) *Act,* 1919 (9 *&* 10 *Geo.* 5, *c.* 65), *s.* 7.

A charity formed in 1749 was incorporated by Act of Parliament in 1809. Its object was to maintain and educate poor orphans of clergymen of the Church of England. Owing to the disestablishment of the Church in Wales doubts arose whether the corporation had power to continue its work among the poor orphans of clergymen in Wales and Monmouthshire, and a summons was issued to obtain a decision of the Court on the point:—

Held, that there was nothing in the Welsh Church Act, 1914, or the Welsh Church (Temporalities) Act, 1919, that interfered with the power of the corporation to maintain and educate poor orphans of clergymen in Wales and Monmouthshire.

Adjourned Summons.

This was an application by the plaintiff corporation, and it asked for the determination of the following questions: Whether any and which of the following children were within the class of orphans eligible for maintenance and education by the corporation—namely: (1.) Poor orphan children of deceased clergymen who (*a*) were ordained to the ministry of the Established Church of England (whether in the Diocese of Llandaff or of St. Asaph or of Bangor or of St. Davids or in some other Diocese of that Church) before the date upon which the Church in Wales and Monmouthshire were disestablished, and (*b*) were beneficed or licensed as assistant curates in Wales or Monmouthshire at or since that date; (2.) Poor orphan children of deceased clergymen who (*a*) were ordained to the ministry of the Established Church of England since the disestablishment of the Church in Wales and Monmouthshire, and (*b*) were beneficed or licensed as assistant curates in the Church in Wales or Monmouthshire since the disestablishment of the Church in Wales and Monmouthshire; (3.) Poor orphan children of deceased clergymen who were (*a*) ordained to the ministry of the Church in Wales and Monmouthshire since the disestablishment of the Church in Wales and Monmouthshire, and (*b*) have been beneficed or licensed as assistant curates in the Church in Wales or Monmouthshire and have not been beneficed or licensed as assistant curates in the Province of Canterbury or York; (4.) Poor orphan children of deceased clergymen who were (*a*) ordained to the ministry of the Church in Wales and Monmouthshire since the disestablishment of the Church in Wales and Monmouthshire, and (*b*) have at some time since ordination been beneficed or licensed as assistant curates in the Province of Canterbury or York.

The plaintiff corporation was formed in 1749, and in 1809 it was incorporated by Act of Parliament. The title to that Act was in the following terms: "An Act for establishing and well-governing the Charitable Institution called 'The Society of Stewards and Subscribers for maintaining and educating poor Orphans of Clergymen until of age to be put apprentice;' and for incorporating such Society; and for more effectually enabling them to carry on their charitable and useful designs." In the preamble the plaintiff corporation was referred to as a charitable society formed for maintaining and educating poor orphans of clergymen of the Church of England. Other parts of the Act are referred to very fully in the judgment. Doubts having arisen as to the corporation being precluded, by reason of the Welsh Disestablishment Acts, from maintaining and educating orphan children of clergy of the Church in Wales and Monmouthshire, this summons was taken out.

By arrangement with the Attorney-General, the defendant John Christopher, an orphan child of a clergyman of the Church in Wales, whom the governors of the corporation were prepared to maintain and educate, if they had the power to do so, and the defendant Patricia Quin, an orphan child of a clergyman of the Church of England, were added as defendants to argue the questions raised by the summons.

Edwardes Jones K.C. and *H. Johnston* for the plaintiff corporation. The question to be decided in this case depends upon the construction of the Act of 1809, the Welsh Church Act, 1914, and the Welsh Church (Temporalities) Act, 1919. The Act of 1809 shows that the charity could not be affected by the disestablishment of the Church in Wales, and the position of the corporation is safeguarded by s. 38, sub-s. 3, of the Act of 1914, and more particularly by s. 7, sub-s. 2, of the Act of 1919. This view finds support in Halsbury's Laws of England, vol. xi., p. 361, para. 691, and see also *In re Trusts of Marshal Beresford's Fund* (1) and *In re Friend of the Clergy's Charters.* (2) The doctrines of the Church of England are still taught by the Disestablished Church in Wales, and there is therefore no reason why the corporation should not continue to maintain and educate poor orphan children of the clergy in Wales and Monmouthshire.

F. H. L. Errington for the defendant John Christopher. In the Act of 1809 clergymen of the Church of England included clergymen in Wales. Four Welsh bishops were named as governors, and it would be curious if they had no beneficiaries. The question then arises whether the rights of poor orphans of clergy in Wales are affected by the Disestablishment Acts of 1914 and 1919. Those Acts are limited in their objects. Their main objects are to withdraw the sanction of the Church of England in Wales and to deprive the Church in Wales of official property only. Private charities and rights are strictly preserved. This view is supported by *In re Friend of the Clergy's Charters.* (1) Charities are specially protected by s. 7 of the Act of 1919.

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(1) (1917) 33 Times L. R. 208.

(2) [1921] 1 Ch. 409.

Beebee for the defendant Patricia Quin. This charity is not the subject of a charter, and neither s. 38, sub-s. 3, of the Act of 1914, or s. 7, sub-s. 2, of the Act of 1919 apply to it. The rights and the powers of this charity are not protected or preserved by either of those Acts. Therefore it no longer has the power to maintain and educate poor orphans of clergymen in Wales and Monmouthshire.

FARWELL J. The plaintiff corporation is a charity which has been in existence for many years. It has carried on and it does still carry on most excellent work in providing for the orphans of poor clergymen, and so long ago as 1809 it was sufficiently established and of sufficient importance to lead Parliament to pass an Act incorporating the society. By the last section of that Act, s. 13, it is provided that the Act "shall be deemed and taken to be a public Act'" The title to the Act is in these terms: "An Act for establishing and well-governing the Charitable Institution called 'The Society of Steward and Subscribers for maintaining and educating poor Orphans of Clergymen until of age to be put apprentice;' and for incorporating such Society; and for more effectually enabling them to carry on their charitable and useful designs." Then the Act recites that "In the year 1749, a charitable society was formed for maintaining and educating poor orphans, of both sexes, of clergymen of the Church of England, until of age to be put apprentice; and the said Society hath been supported by the voluntary subscriptions and donations of charitable and well-disposed persons, and a very great number of such orphans have been received into the respective schools of the said charity, and maintained and educated by means of the funds belonging thereto; and such orphans have been instructed in the doctrines of the Christian religion as taught by the established Church, and in reading, writing, and arithmetic, and the girls also in needlework and household business, and trained in habits of industry and regularity." It then proceeds, "that the said charity hath been hitherto of considerable advantage to the public, and it is apprehended, that if countenanced and supported by the laws of this realm, and established upon a permanent footing, and vested with powers for better enabling the subscribers thereto to carry into execution their charitable and useful designs, the said charity would be of much more extensive use, and of still greater benefit and advantage to the public," and then it is enacted "that from and after the passing of this Act, there be and shall be a Corporation to continue for ever, for clothing, maintaining, and educating poor orphans of clergymen until of age to be put apprentice." The preamble does not speak of "the clergymen of the Established Church of England"; in referring to the society it describes it as a society for "maintaining and educating poor orphans of clergymen," and in the first recital in the very opening words of this Act there is a reference to "clergymen of the Church of England," but the word "Established" is not there used. The only place in the early part of the Act in which one finds the use of the word "Established" is in the recital which recites what doctrines were to be taught by the society to the orphans, i.e., the doctrines of the Established Church of England. Then later on in the Act it is provided that the name of the corporation is to be "The Governors ot the Society for clothing, maintaining, and educating poor orphans of clergymen of the Established Church, in that part of the United Kingdom of Great Britain called England, until of age to be put apprentice." In that connection it may be material to notice that by an Act of 20 Geo. 2, c. 42, s. 3, it is provided that "In all cases where the Kingdom of England, or that part of Great Britain called England, hath been or shall be mentioned in any Act of Parliament, the same has been and shall from henceforth be deemed and taken to comprehend and include the dominion of Wales," but apart altogether from that Act, it is quite clear that when the Act of 1809 was passed it was intended to apply and did in fact apply not only to the Church in England, but to the Church in Wales. At that time the Church of England and the Church of Wales were one body established by law, and there is no possible doubt but that under this Act the persons within the ambit of the charity were orphans of clergymen of the Church of England and Wales, which at that time was the Established Church of England. Any one speaking in 1809 of the Church of England would have meant and necessarily must have meant the Established Church of England, including Wales, so that at any rate down to the passing of the Welsh Church Act the orphans of clergymen, whether they were beneficed in England or in Wales, were objects or might be objects of the charity. But in 1914 there came the Welsh Church Act. The preamble to that Act is as follows: "An Act to terminate the establishment of the Church of England in Wales and Monmouthshire, and to make provision in respect of the Temporalities thereof, and for other purposes in connection with the matters aforesaid." Then, by s. 1 of that Act, it is provided: "On the day after the expiration of six months, or such extended period as His Majesty may fix by Order in Council, not being more than twelve months, after the passing of this Act (in this Act referred to as the date of disestablishment)"—that was in fact fixed by a subsequent Act as March 31, 1920—"the Church of England, so far as it extends to and exists in Wales and Monmouthshire (in this Act referred to as the Church in Wales), shall cease to be established by law, and, save as by this Act provided, no person shall, after the passing of this Act, be appointed or nominated by His Majesty or any person, by virtue of any existing right of patronage, to any ecclesiastical office in the Church in Wales." By s. 2 it is provided: "On the date of disestablishment every cathedral and ecclesiastical corporation in the Church in Wales, whether sole or aggregate, shall be dissolved." Then, by s. 3, sub-s. 1, it provides for the cessor as from the date of disestablishment of the jurisdiction of the ecclesiastical courts and persons in Wales and of the ecclesiastical law of the Church in Wales. Sect. 3, sub-s. 2, provides: "As from the same date the then existing ecclesiastical law and the then existing articles, doctrines, rites, rules, discipline, and ordinances of the Church of England shall, with and subject to such modification or alteration, if any, as after the passing of this Act may be duly made therein, according to the constitution and regulations for the time being of the Church in Wales, be binding on the members for the time being of the Church in Wales in the same manner as if they had mutually agreed to be so bound, and shall be capable of being enforced in the temporal courts in relation to any property which by virtue of this Act is held on behalf of the said Church or any members thereof, in the same manner and to the same extent as if such property had been expressly assured upon trust to be held on behalf of persons who should be so bound." Pausing there, I should say there is no evidence before me to suggest that there has ever been since the Act came into operation any alteration made which affects in any way that section. The result of this is that at the present moment the "existing articles, doctrines, rites, rules, discipline, and ordinances of the Church of England" apply to the Church in Wales, after the passing of the Act, not by force of law but as a matter of agreement between those persons who are members of that body, and I think that it is reasonably plain from the Act itself that, while the Act does undoubtedly divorce the Church in Wales from the civil control to which formerly it was subject, the Act does not operate, nor is it intended to operate, further than is necessary for that purpose. The last material section to which I need refer is s. 38, sub-s. 3, which is in these terms: "In all enactments, deeds, and other documents in which mention is made of the Church of England, the enactments and provisions relating thereto shall be construed as including the Church in Wales, but as to that Church subject to the provisions of this Act." Then in 1919 the second Act, the Welsh Church (Temporalities) Act, was passed. It provides for the date of disestablishment, and there is a provision in s. 7 which is entitled "Provisions as to charities." By sub-s. 2 of that section it is provided: "Where by any charter, deed, or other document any association, institution,

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(1) [1921] 1 Ch. 409.

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or society, whether corporate or unincorporate, is empowered, or is under a duty, to make any grant or payment to any persons or body of persons, whether corporate or unincorporate, in Wales and Monmouthshire, such power or duty shall not be affected by reason of any parish of the Church in Wales ceasing to be a part of the province of Canterbury or of York, notwithstanding anything contained in any such charter, deed, or document." Those, I think, are all the sections which are relevant for this purpose of the two Welsh Acts. I should say at once with regard to s. 7, sub-s. 2, of the Act of 1919 that I am not satisfied that it applies to this case. What I am construing here is the Act of 1809, and in my judgment that Act cannot be included in the words "charter, deed, or other document," having regard to the fact that in the earlier Act the words are "in all enactments, deeds, and other documents." It is, however, not necessary for me to determine that finally, because I am not resting my judgment on that sub-section of the Act of 1919; but I think that I should say that I feel some difficulty in thinking that that sub-section is directly applicable to the present case. It does, however, throw some light on the question, since it manifests a desire on the part of Parliament to leave unaffected any rights or claims which any one may have in respect of a charity or an institution which was a charity or institution for the benefit of persons who were members of the Established Church, which included the Church both in England and Wales before the passing of the Welsh Church Act.

Now it is said that the Church in Wales, having been disestablished as a result of the Welsh Church Act of 1914, has ceased to be any part of the Established Church of England and, therefore, on the true construction of the Act of 1809 orphans of clergymen of the Church in Wales are no longer objects of the charity. With regard to the classes of persons mentioned in the first two sub-paragraphs of paragraph 1 of the originating summons the question in relation to those persons has already been determined for me by Astbury J. in *In re Friend of the Clergy's Charters* (1), but I

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(1) [1921] 1 Ch. 409.

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may say that apart altogether from that decision I should have come to the same conclusion. It is, in my judgment, quite clear that the orphan children of deceased clergymen who were ordained to the ministry in the Established Church of England before the Act of 1914 were and are objects of the charity notwithstanding those clergymen were beneficed or licensed as clergymen in Wales since that date. Such clergy were beyond all question clergymen of the Church of England, whether that term is used as meaning the Established Church of England or something else; and their children were undoubtedly children of clergymen of the Church of England, and they did not cease to be children of clergymen of the Church of England within the meaning of the Act of 1809 because their fathers were beneficed or licensed to a cure in Wales. With regard to the second class of persons, that again is really concluded by the decision of Astbury J., and there also I take the view that those particular orphans come within the ambit of the charity. The clergymen if they were ordained to the ministry in the Established Church in England, whether before or after the disestablishment of the Church in Wales, were and remain clergymen of the Church of England although they were beneficed or licensed to a cure in Wales. The real difficulty in this case, and this is not in any way covered by the decision of Astbury J., arises with regard to the class of persons in subparagraph 3 of the summons: "Poor orphans children of deceased clergymen who were (*a*) ordained to the Ministry of the Church in Wales and Monmouthshire since the disestablishment of the Church in Wales and Monmouthshire and (*b*) have been beneficed or licensed as Assistant Curates in the Church in Wales or Monmouthshire and have not been beneficed or licensed as Assistant Curates in the province of Canterbury or York," that is to say the orphan children of deceased clergymen who were not ordained in the Church of England and had never had a benefice or been licensed as clergymen in the Church of England. It is said that the orphans of those clergymen at any rate cannot come within the ambit of this Act, because on the true construction of the Act the objects of it are confined to the orphan children of deceased clergymen of the Established Church of England. Now it is necessary to turn again to the words of the Act of 1809 and, in considering the words of that Act, it must be borne in mind that at the date of the Act the phrase "the Church of England" meant the Established Church of England, which included the Church in Wales, and in the preamble there is a reference to the fact that this charitable society was formed for educating and maintaining poor orphans of the clergymen of the Church of England, which would necessarily include at that date the orphan children of the clergymen of Wales, and it provides, amongst other things, that the doctrines of the Established Church shall be taught to the orphans.

Now does the Church in Wales cease to be part of the Church of England for the purpose of this Act of 1809 because as a result of the Welsh Church Acts it is disestablished in the sense that from the point of view of civil and temporal matters it is no longer an Established Church? In my judgment, on the true construction of this Act, the Church in the Act referred to is the Church of England and of Wales and the Welsh Church Acts have not had the effect of making the Church that is referred to in this Act any less the Church in England and in Wales, and accordingly by this Act the Corporation still has the power which it had before the passing of the Welsh Church Acts to extend its bounty to the orphans of clergymen of the Church in Wales, whether they have or have not at some time held cures in England or whether they were or were not originally ordained or licensed in England. In my judgment when the Established Church is referred to in this Act it is referring to what was then the Established Church, i.e., the Church in England and in Wales, and it was not intended to and did not in fact limit the scope of the Act or the scope of the charity by the use of that term so as to disqualify persons who were then qualified or would become qualified under the Act to benefit because a portion of what was then the Established Church ceased to be established and ceased to be subject to the civil law as it had been before. I am not saying that if the Church in Wales ceased to recognize the existing articles, doctrines, rites and religious ordinances of the Church of England it would not then cease to be part of the Church of England; that question does not arise and I am not deciding it, but what I am deciding is that on the true construction of this Act, the Church of England which is referred to in the Act included the Church in Wales, and the Church in Wales is still included notwithstanding the passing of the Welsh Church Acts. Sect. 38, sub-s. 3, of the Act of 1914 very greatly supports that view, because it provides "In all enactments, deeds, and other documents in which mention is made of the Church of England, the enactments and provisions relating thereto shall be construed as including the Church in Wales, but as to that Church subject to the provisions of this Act." There is nothing in the provisions of the Act which in any way prevents me holding that the Church of England in the Act of 1809, whether it is therein referred to as the Established Church of England or simply the Church of England, included within that definition or description the Church in Wales, and in my judgment the effect of sub-s. 3 of s. 38 would have been enough in itself to justify my coming to the conclusion which I have come to; but I desire to state that I reach that conclusion on the construction of the Act of 1809, and I should have come to the same conclusion even without the assistance of s. 38, sub-s. 3. That sub-section confirms the view that I have already expressed, that all the orphan children who are referred to in clause 1 of the originating summons are within the scope of the Act of 1809 and the corporation is therefore still entitled to extend its bounty if it thinks right to the orphans of such clergymen, whether they were or were not beneficed or licensed as clergymen within the Church in England as well as the Church in Wales.

Solicitors: *Andrew, Purves, Sutton & Creery; Clarke, Rawlins & Co., for Barker, Morris & Owen, Carmarthen; Hatchett Jones & Co.; The Treasury Solicitor.*

P. J. B.

MAUGHAM J.

1932

Nov. 11, 14, 15.

CRUSE *v.* MOUNT.

[1931. C. 5046.]

Landlord and Tenant—Flat—Lease for immediate Occupation—Fitness for Habitation—Warranty by Landlord not implied.

In a lease of an unfurnished flat there is not to be implied a condition or a warranty that the flat is reasonably fit for occupation.

Manchester Bonded Warehouse Co. v. *Carr* (1880) 5 C. P. D. 507 followed.

WITNESS ACTION.

The defendant granted to the plaintiff a lease of a flat for ten years, and covenanted for quiet enjoyment. The flat proved unsatisfactory, and less than seven months after the date of the lease the defendant wrote to the plaintiff that repairs were essential and would have to be carried out in the absence of the plaintiff and his household. The plaintiff and his wife moved out of the flat a fortnight later, and decided that, as they had been much worried by the trouble and inconvenience which they had experienced ever since they had entered into possession of the flat, they would not return to it. By this action the plaintiff claimed (inter alia) damages for breach of the defendant's covenant for quiet enjoyment or for trespass, and the defendant counterclaimed for payment of rent. The only point calling for report is whether the letting of a flat for immediate occupation implies a condition or warranty that it is fit for human habitation.

W. P. Spens K.C. and *F. R. Evershed* for the plaintiff. There are many authorities that there is no implied warranty on a sale of land with or without furnished houses upon it. There is an implied warranty on the letting of a furnished house, because the house is let by the landlord and taken by the tenant for immediate habitation. The Court of Appeal has held that even in the case of an unfurnished house the implication may arise: normally, however, it does not. In regard to flats there is no decided case. The first authority to be considered is *Smith* v. *Marrable* (1), the case dealing with the letting of a furnished house. Next came *Sutton* v. *Temple* (2), in which it was held that on a demise of land for a term at a rent there is no implied obligation that it shall be fit for the purpose for which it was taken, and which Parke B. distinguished from *Smith* v. *Marrable* (1) on the ground that in that case "the contract was of a mixed nature, being a bargain for a house *and furniture*, which was necessarily to be such as was fit for the purpose for which it was to be used": see also *Hart* v. *Windsor*. (3) In *Wilson* v. *Finch Hatton* (4) Kelly C.B. said in his judgment: "Now the circumstances in which furnished houses are, and those in which real property is, demised, differ very greatly": see also *Bunn* v. *Harrison*. (5) The most recent case is *Collins* v. *Hopkins* (6), in which McCardie J. said: "In the case of an unfurnished house there is ordinarily no warranty of fitness for occupation. Special circumstances may create such a warranty, and with respect to working-class houses particular provision is made by statute. Normally, however, no warranty exists. It is important, however, to point out that in *Bunn* v. *Harrison* (5) the Court of Appeal expressly left open the question whether there is an implied warranty of fitness in the case of an unfurnished house if it be let for immediate occupation. The rule is different with respect to furnished houses or apartments. In such a case the law implies, in the absence of agreement to the contrary, a warranty by the landlord as to the state and fitness of the premises": see also *Sarson* v. *Roberts* (7), to which McCardie J. referred. A lease of a flat is not a lease of land. It is a lease only of a number of rooms. Those rooms are all that the lessee is taking, and he is taking them for immediate habitation. Therefore the cases dealing with unfurnished houses are not in point and the law relating to furnished houses ought to be applied. If the law relating to unfurnished houses is to be applied to unfurnished flats, there will be

(1) (1843) 11 M. & W. 5.
(2) (1843) 12 M. & W. 52, 65.
(3) (1844) 12 M. & W. 68.
(4) (1877) 2 Ex. D. 336, 342.
(5) (1886) 3 Times L. R. 146.
(6) [1923] 2 K. B. 617, 618.
(7) [1895] 2 Q. B. 395.

imposed upon lessees of unfurnished flats conditions which they cannot discharge, for they will have to send surveyors to inspect the whole of the building to see if there is any structural defect.

J. W. Manning K.C. and *Russell Gilbert* for the defendant. *Sutton* v. *Temple* (1) and *Hart* v. *Windsor* (2) were applied in *Manchester Bonded Warehouse Co.* v. *Carr* (3), a case in which floors were let separately. That decision applies to occupants of flats, separate floors, or buildings which are merely divided horizontally. On that point the principle of that decision covers the present case. It has never before been suggested that the fact that a flat was wanted for immediate occupation made any difference. In *Bunn* v. *Harrison* (4) there was an express warranty, and the question whether there was an implied warranty did not arise. There are recent statutes dealing with housing for the working classes: see Foà on Landlord and Tenant, 6th ed., pp. 169–171. It is difficult to see why a rule different from that which applies to the letting of unfurnished houses should apply to the letting of unfurnished flats simply because the flats are taken for immediate and not for postponed occupation. As the law stands now, the only exceptions to the rule which applies to the letting of unfurnished houses or dwellings are dwellings which are let to the working classes, and even they are exceptions only if they comply with the provisions of the statutes which deal with housing for the working classes. There are many ways in which a prospective tenant of a flat can safeguard himself. For example, he can stipulate that a surveyor shall inspect the whole building on his behalf. There can be put in the leases of all the flats a clause enabling the landlord to view them, and the landlord can pass that right on to a prospective tenant. If, in regard to the letting of unfurnished dwellings, any exception is to be made to the maxim "caveat emptor," it should be made by Parliament (as has already been done in the case of houses for the working classes) and not by the Court.

(1) 12 M. & W. 52.
(2) 12 M. & W. 68.
(3) 5 C. P. D. 507.
(4) 3 Times L. R. 146.

Spens K.C. in reply. In the judgment in *Manchester Bonded Warehouse Co.* v. *Carr* (1), which was read by Lord Coleridge C.J., is the statement: "There are, it is true, some cases relating to furnished apartments and houses which tend to shew that a person who lets them impliedly warrants that they are fit for residential purposes: *Smith* v. *Marrable* (2) and *Wilson* v. *Finch Hatton* (3); but we are not prepared to extend these decisions to ordinary leases of lands, houses, or warehouses, as we must if we are to hold the plaintiffs liable for the fall of this warehouse by reason of any implied covenant or warranty." The point which is being put before the Court in the present case was not put before the Court in that case. When a lease is taken of land with a house on it what is being taken is a lease of the land with the house as an adjunct. The law as to land with unfurnished houses on it is well established: but with regard to an unfurnished flat the test is the intention of the parties as to the subject-matter. The parties are contracting for a residence for immediate occupation, and the Court, in applying the law as to furnished houses, is not making new law but is applying established law—namely, the ordinary law of contract.

MAUGHAM J. [after stating the facts, holding that the defendant, though he had not actually evicted the plaintiff, had by telling him of the dangerous condition of the flat and requesting him to leave in order that the necessary repairs and alterations might be carried out, made it reasonably necessary for him to leave it, and after giving judgment on a point not material to this report:] I now turn to the consideration of the question whether, in regard to the letting of a flat for immediate occupation, there is an implied condition that the premises are fit for human habitation. The leading authority on the subject of furnished lodgings is *Smith* v. *Marrable* (2), the well known case in which Lady Marrable took a house in

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(1) 5 C. P. D. 507, 511.
(2) 11 M. & W. 5.
(3) 2 Ex. D. 336.

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Brighton for five or six weeks and found after she entered into possession that it was so infested with bugs that it was impossible for her to remain in it. The case came before Parke B., Lord Abinger C.B., and Alderson and Gurney BB. I should add that the agreement was in writing, so it was not a case of a merely verbal agreement. The learned judges held that a man who lets a ready furnished house does so under the implied condition or obligation that the house is in a fit state to be inhabited, and that if the demised premises are incumbered with a nuisance of so serious a nature that no person could reasonably be expected to live in them, the tenant is at liberty to throw the lease up. That decision has been doubted. It was, however, followed by the Exchequer Chamber in some other cases which I need not here mention. It was distinguished in the case of *Hart* v. *Windsor* (1), where there was a lease of an unfurnished house and garden ground. In that case the Court held that the law implied no contract on the part of the lessor that the house was at the time of the demise or would be at the commencement of the term in a reasonably fit state for habitation; and it may be noted that Parke B. there, referring to his own judgment in *Smith* v. *Marrable* (2), observed that that case could certainly not be supported on the ground on which he had rested his judgment. Since then *Smith* v. *Marrable* (2) has on one ground or another constantly been followed, and I at any rate do not intend to cast any doubt on its being a correct decision. Accordingly the matter stands thus, that, in regard to the letting of furnished premises there is an implied condition that the premises shall be fit for human habitation at the date when the tenancy begins, and that if they are not so fit the lessee can give up the tenancy. In regard to an unfurnished house, for the reasons given in the case of *Hart* v. *Windsor* (1), including the obvious reason that unfurnished houses are constantly let in a very bad state (the state of repair being one which is reflected in the rent), it has been held that there is no such condition or warranty.

(1) 12 M. & W. 68.

(2) 11 M. & W. 5. See 12 M. & W. 86, 87.

It was argued here on behalf of the plaintiff that the case of a flat is midway between the two, and that in the case of a flat the same rule should be followed as that which applies in the case of furnished lodgings. It is pointed out that in the case of a flat it very often happens, as it did in the present case, that the landlord does not undertake to repair the inside of the flat, and it will be observed that the practice is not for intending tenants of flats to send a surveyor to examine the building, since a surveyor could not make a proper examination of the structure in a case where other flats are in the possession of other tenants. Further, it is to be noted that, if the building is structurally in bad repair, the tenant under an ordinary tenancy of a flat has no power to rebuild or reconstruct the premises. To do that he would have to go into flats which belong to other tenants and to attempt to do work on the premises which he has no power to do. I should not have felt any serious reluctance in holding, if it were open to me to do so, that the case of a flat is one of a special character, and that there was in this case an implied condition that the flat was fit for habitation, or, at any rate, that the flat was not part of a dangerous structure. I am, however, bound, as it seems to me, by the decision of the Common Pleas Division in *Manchester Bonded Warehouse Co.* v. *Carr* (1), a decision of Coleridge C.J. and Grove and Lindley JJ. The plaintiffs there had demised certain floors in a warehouse to the defendant, Mr. Carr. The defendant covenanted, as the plaintiff did here, to repair and maintain the inside of the premises. The plaintiffs there covenanted to keep the walls, roofs and timbers of the premises in good and substantial repair and condition. Sub-lessees of the defendant overloaded a floor of the warehouse with flour, in consequence of which the whole building fell. The plaintiffs rebuilt it, and sued for rent during the time the building was unoccupied and for damages. The defendant denied liability, and claimed damages from the plaintiffs. It was held, first, that notwithstanding the fall the defendant was liable to pay the rent, and secondly,

(1) 5 C. P. D. 507.

that there was no implied warranty by the plaintiffs that the building was fit for the purpose for which it was to be used.

The judgment of the Court on the question of warranty was simply based on the fact that no authority had decided that there was any such warranty, and what authority there was on the point was against its existence; and the Court held that no such warranty could be implied. It is true that the report does not state whether it was the ground floor or the first or some other floor that was sublet; but I am unable on any ground which seems to me to be satisfactory to distinguish that case from the present one. It was a lease of part of a building, where all the considerations I have mentioned as applicable in the case of a flat were, to some extent, applicable, and the Court, one composed of very eminent judges, came to the conclusion that it would be to extend the law to hold that any warranty could be implied in such a case. Accordingly I must hold, following that decision, that a landlord is entitled to let a flat in a building without being held to be giving such an implied warranty. The plaintiff is therefore not entitled to maintain an action for damages for breach of warranty nor entitled by treating the warranty as a condition to put an end to the lease.

[His Lordship then held that, by causing the plaintiff to leave the flat, the defendant had broken the covenant for quiet enjoyment, that the damages payable by him should include the cost of removal, storage, and return to the flat of the plaintiff's furniture, and that on the counterclaim the defendant succeeded.]

Solicitors: *Finnis, Downey, Linnell & Chessher; Dudley M. Paul & Co.*

K. R. A. H.

SYKES *v.* WILLIAMS.

C. A.

1932

Oct. 26, 27, 28.

[1932. S. 2625.]

[MANCHESTER DISTRICT REGISTRY.]

Limitations, Statutes of—Grant of Freehold Land—Perpetual Yearly Rentcharge—Power of Re-entry on Rentcharge becoming One Year in arrear—No Rent paid for Twenty Years—Rentcharge barred—Arrears irrecoverable—No continuing Power of Re-entry—Real Property Limitation Act, 1833 (3 *&* 4 *Will.* 4, *c.* 27), *s.* 3—*Real Property Limitation Act*, 1874 (37 *&* 38 *Vict. c.* 57), *s.* 1—*Law of Property Act*, 1925 (15 *Geo.* 5, *c.* 20), *s.* 1, *sub-s.* 2.

In 1912 freehold land was conveyed to purchasers in consideration of and subject to a perpetual yearly rentcharge of 25*l.* a year issuing out of the land and the buildings to be erected thereon, payable half-yearly in March and September. The grantees entered into a covenant for payment, and the conveyance also contained a power of re-entry exercisable by the vendor, his heirs, executors, administrators and assigns, owner or owners for the time being of the said rentcharge if and whenever the rentcharge should be in arrear and unpaid for one year, but limited to take effect during the lives of the parties thereto and the lives of the issue then living of Her late Majesty Queen Victoria and the survivors and survivor of them, and twenty-one years after the death of the survivor, and such other period (if any) as should be lawful.

No part of the yearly rentcharge of 25*l.* was ever paid, and in 1931 the vendor sued to recover possession with mesne profits. The defendant pleaded that the rentcharge and all remedies to recover the same were statute barred.

Eve J. held that though the personal remedy on the covenant for payment was barred, the power of re-entry was not extinguished or barred by s. 1 of the Real Property Limitation Act, 1874, and s. 3 of the Real Property Limitation Act, 1833, inasmuch as it accrued afresh in respect of each subsequent half-yearly day whenever any part of the rentcharge was in arrear for one year, and the plaintiff was therefore entitled to rely on the default in payment which occurred in the years 1919 to 1923 inclusive.

On appeal:—

Held, that, on the true construction of the deed, the plaintiff was not entitled to enforce the right of re-entry given him by that deed unless at the time when he sought to enforce that right he was in a position to assert that he was the owner of the rentcharge thereby created. It was conceded by the plaintiff that on March 26, 1925, the rentcharge ceased to exist. At that time, therefore, his right to enforce or recover any arrears of rentcharge came to an end. That being so, it was impossible for the plaintiff to assert that at the date when he issued the writ in this action he was the owner of the rentcharge. The action therefore failed, and the appeal must be allowed.

Decision of Eve J. [1932] 2 Ch. 190 reversed.

APPEAL from a decision of Eve J. (1)

By a conveyance dated June 7, 1912, and made between Herbert Rushton Sykes, the plaintiff, of the one part, and Edward Williams, the defendant, and Hugh Williams of the other part, a plot of land in Edgeley, Stockport, upon part of which four dwelling-houses had since been erected, and containing 3278 square yards or thereabouts, was granted and conveyed by the plaintiff to the defendant and Hugh Williams (therein described as "the grantees") and their heirs, to the use that the plaintiff, his heirs and assigns should receive a perpetual yearly rentcharge of 25*l.* issuing out of the land thereby conveyed and the buildings erected or to be erected thereon, and payable by two equal half-yearly payments on March 25 and September 29 in every year. And subject to the rentcharge and to the statutory powers and remedies for recovering and compelling payment thereof to the use of the grantees, their heirs and assigns as tenants in common in equal shares.

By the conveyance the grantees and each of them covenanted with the plaintiff at all times thereafter to pay the said rentcharge of 25*l.* at the times and in manner aforesaid. And it was also provided that if and whenever the yearly rentcharge or any part thereof should be in arrear and unpaid for one year after either of the half-yearly days thereinbefore appointed for payment (whether demanded or not) or if there should be any breach of the covenants therein contained on the part of the grantees then, notwithstanding the waiver of any previous default or breach, it should be lawful for the grantees and they thereby granted unto the plaintiff, his heirs, executors, administrators and assigns, owner or owners for the time being of the said rentcharge at any time during the lives and life of the parties thereto and during the lives and life of the issue then living of Her late Majesty Queen Victoria and the survivors and survivor of them and twenty-one years after the death of such survivor and during such further period (if any) as should be lawful full and free liberty, power and authority to enter into and upon the said plot of land thereby conveyed and any buildings thereon or any part thereof in the name of the whole and to repossess and enjoy the same as if the conveyance had not been made.

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(1) [1932] 2 Ch. 190.

Hugh Williams died on November 1, 1924, and letters of administration to his real and personal estate were granted on September 11, 1926, to the defendant and Thomas Williams.

Under the combined effect of the transitional provisions of the Law of Property Act, 1925, and of an appointment of new trustees dated May 10, 1927, and a conveyance dated May 11, 1927, and made between J. F. Andrew and J. T. Johnstone of the one part and the defendant of the other part, the defendant became entitled in fee simple to part of the said plot of land conveyed in 1912, and to four houses erected thereon, being 1A, 3A, 5A and 7A Vienna Road, Edgeley. The defendant was by his tenants in possession of the four dwelling-houses and their site.

No part of the yearly rentcharge had ever been paid. In particular the instalments due and payable on September 29, 1919, March 25 and September 29, 1920, and March 25 and September 29, 1921, 1922 and 1923 were all at the date of the issue of the writ in arrear for the space of one year after the dates fixed for payment.

The plaintiff, who was at all material times owner of the rentcharge, claimed possession of the four dwelling-houses, together with mesne profits as from the date of the writ. The defendant admitted all the above facts as set forth in the statement of claim, and contended that the yearly rentcharge and all covenants and powers of re-entry incident thereto were at the date of the issue of the writ barred and extinguished by virtue of the Real Property Limitation Acts, 1833 and 1874. But if the rentcharge and/or the powers of re-entry were not so barred, he claimed relief from forfeiture under s. 146 of the Law of Property Act, 1925.

Eve J. held that though the personal remedy on the covenant for payment was barred, the power of re-entry was not extinguished or barred by s. 1 of the Real Property

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Limitation Act, 1874, and s. 3 of the Real Property Limitation Act, 1833, inasmuch as it accrued afresh in respect of each subsequent half-yearly day whenever any part of the rentcharge was in arrear for one year, and the plaintiff was therefore entitled to rely on the default in payment which occurred in the years 1919 to 1923 inclusive.

The defendant appealed. The appeal was heard on October 26, 27 and 28, 1932.

Sir Gerald Hurst K.C. and *J. M. Easton* for the appellant. The rentcharge in this case became barred under s. 1 of the Real Property Limitation Act, 1874. This Act is by s. 9 to be construed with the Real Property Limitation Act, 1833, in so far as it is not repealed by the 1874 Act, and s. 1 of the 1833 Act defines "rent" as extending to "all annuities and periodical sums of money charged upon . . . . any land." It is not merely the right to bring proceedings in respect of the rentcharge that is barred, but by s. 34 of the Act of 1833 the right and title to the rentcharge is extinguished. It follows that in this case the rentcharge was extinguished on March 25, 1925, and after that date all arrears of rent which had accrued were irrecoverable and the power of entry could not be exercised. Eve J. has however held that the power of entry continued to exist in respect of arrears between 1919 and 1923 inclusive. It is contended that the right of entry no longer subsists in the first place because on the construction of the proviso for re-entry in the conveyance of June 7, 1912, it belonged to the plaintiff, his heirs, executors, administrators and assigns, owner or owners for the time being of the rentcharge. It is therefore a right exercisable only by an owner of the rentcharge, and after March 25, 1925, that ownership was extinguished.

Again, that a rent under a rentcharge falls within the definition of "rent" in s. 1 of the 1833 Act is decided in *Jones* v. *Withers* (1) and s. 1 of the Act of 1874 therefore barred the title to the rentcharge in this case. Further, in *In re Jolly* (2) it was decided that in the case of a tenant from year to year remaining in possession for the statutory period without payment, the title of the landlord was barred not only to the land but also to the arrears of rent. For this reason the right to sue on the personal covenant is gone: *Shaw* v. *Crompton* (1), so that on this ground also it must follow that the power of re-entry is extinguished.

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(1) (1896) 74 L. T. 572.

(2) [1900] 2 Ch. 616.

Eve J. has been misled by drawing an analogy from a case relating to lessor and lessee—namely, *Barratt* v. *Richardson and Cresswell.* (2) There is no such analogy, for s. 34 of the Real Property Limitation Act, 1833, has no application to rent under a lease: compare *Grant* v. *Ellis.* (3) In that case the rent was not extinguished, and as the right to re-enter accrued from year to year the landlord was entitled to re-enter in respect of any previous non-payment of rent up to twelve years before writ. Sect. 3 of the Act of 1833 has no application to the present case.

The right of re-entry is annexed to the rentcharge. That is how such a right is described in the Law of Property Act, 1925, s. 1, sub-s. 2 (*e*).

But should the Court not accept the argument that the right of re-entry is gone, relief ought to be given on less onerous terms than those imposed by Eve J.

Henry Johnston and *Denis Johnston* for the respondent. Much of the argument for the appellant is accepted. It is not denied that the rentcharge was extinguished in 1925. But the conveyance in this case of the fee simple was subject to the rentcharge and to a common law right of re-entry. That is a right to re-enter on condition broken not operating under the Statute of Uses. It is necessary to distinguish between the right conferred by this deed and the right of re-entry for the purpose of remaining in possession until the rents and profits have satisfied all arrears. The latter right is that conferred by s. 44 of the Conveyancing Act, 1881 (now s. 121 of the Law of Property Act, 1925). The right of re-entry conferred by the conveyance of June 7, 1912, is to enter and put an end to the purchaser's estate in fee simple. The result is that the purchaser never had more than an estate defeasible on condition broken. He has at no time had more than a conditional fee simple: Gilbert on Rents (1758 ed.), p. 135; Co. Litt. (17th ed.), pp. 201a, 202b, 203a. There is therefore a right to re-enter in respect of arrears of the rentcharge which became payable less than twelve years before these proceedings were brought. The fact that the grant of the power of re-entry is to the plaintiff, his heirs, executors, administrators and assigns, owner or owners for the time being of the rentcharge, does not make the right of re-entry dependent on the continued existence of the rentcharge. The words "owner or owners for the time being" of the rentcharge are added merely to define the character of the assigns contemplated. Further, when first the right of entry arose which it is now sought to enforce the rentcharge was still in existence. A fresh right of entry accrued each half-year in respect of the instalment of rent, which then became one year in arrear. On the happening of that event the respondent's interest in the property became a vested interest to be reduced into possession by ejectment. That can be done at any time until the right to do so is defeated by some Statute of Limitations. The relevant section is s. 3 of the Real Property Limitation Act, 1833, under which the right to make an entry is deemed to have accrued when the forfeiture was incurred.

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(1) [1910] 2 K. B. 370.

(2) [1930] 1 K. B. 686.

(3) (1841) 9 M. & W. 113, 125.

[LAWRENCE L.J. That would be a year after the first default, that is on March 25, 1914.]

No, because a new right arose on each new default. On each default there was a new forfeiture.

[LORD HANWORTH M.R. That view does not take into account the provision in s. 3 that "such right shall be deemed to have first accrued when such forfeiture was incurred."]

It is in regard to the construction of the Act that the decision in *Barratt* v. *Richardson and Cresswell* (1) is of importance. It shows that a power of re-entry accrues afresh as each payment of rent becomes in arrear for one year. It is therefore contended that Eve J. was right in his decision.

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(1) [1930] 1 K. B. 686.

As regards the terms on which Eve J. gave relief, those were the proper terms and his decision ought not to be disturbed.

[They also referred to *Sutton* v. *Sutton.* (1)]

Sir Gerald Hurst K.C. replied.

Lord Hanworth M.R. This appeal raises a number of very interesting points, which have been ably presented to us by counsel on both sides, but a great number of the points, interesting though they are, do not really arise if we take a particular view as to the construction of the document creating the rentcharge with which we have to deal in this case.

The facts which give rise to this matter can be quite shortly stated. On June 7, 1912, the plaintiff conveyed a certain plot to a purchaser at a yearly rentcharge of 25*l.* By that conveyance the plaintiff conveyed to the purchaser a plot of land at Edgeley in the borough of Stockport, which is described upon the plan attached to the conveyance, and there was excepted and reserved to the vendor, his heirs, executors, administrators and assigns "all rights restricting the free use of any adjacent or neighbouring lands . . . . to the use that the vendor his heirs and assigns shall receive a perpetual yearly rentcharge of 25*l.* issuing out of the land hereby conveyed and the buildings erected or to be hereafter erected thereon and payable by two equal half-yearly payments on the 25th day of March and the 29th day of September in every year the first half-yearly payment or a proportionate part thereof calculated from the 29th day of September 1912 to be made on the 25th day of March 1913 And subject to the said rentcharge and to the statutory powers and remedies for recovering and compelling payment thereof." There was also a proviso, which is in these terms: "Provided always and these presents are executed upon this express condition that if and whenever the said yearly rentcharge of 25*l.* or any part thereof shall be in arrear and unpaid for the space of one year next after either of the said half-yearly days hereinbefore appointed for payment thereof (whether demanded or not) or if there shall be a breach of any of the covenants . . . . it shall be lawful for and the purchasers for themselves and each of them for himself his heirs executors administrators and assigns hereby grants unto the vendor his heirs executors administrators and assigns owner or owners for the time being of the said yearly rentcharge hereby limited at any time during the lives and life of the parties hereto "—and then comes a provision so that the proviso shall not offend the rule against perpetuity—"full and free liberty power and authority to enter into and upon the said plot of land."

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(1) (1882) 22 Ch. D. 511.

The events which took place are somewhat curious. It will be observed that the first time when the rent was payable was March 25, 1913. It was not paid, and a year from the date when the first payment became due would be March 26, 1914. But the rentcharge has never been paid at all. I have noted the date when the rent was payable for the purpose of clarity. The twelve years after that date would be March 25, 1925. The right of re-entry which arises after a year during which there has been non-payment would be, taking twelve years, March 26, 1926. The main date is March 26, 1925, which is the date which completes the twelve years after the rentcharge or part thereof first became due.

The writ in the present action was issued on May 13, 1932. It was issued therefore more than seven years after March 25, 1925. We have to apply to the claim the Real Property Limitation Act, 1833. The defendant admits that no part of the yearly rentcharge has ever been paid, and he says: "That the said yearly rentcharge and all covenants and powers of re-entry incident thereto or granted by the said conveyance of June 7, 1912, are, and were at the date of the issue of the writ in this action, barred and extinguished by virtue of the Real Property Limitation Act, 1833," to which I have referred, as amended by the Act of 1874. We all know that the Real Property Limitation Act, 1833, and the Real Property Limitation Act, 1874, are to be read together. The Act of 1874 repealed certain sections of the Act of 1833, to which our attention was drawn by Mr. Denis Johnston, but for the rest, the Act of 1833 remains standing subject to this, that the span of limitation is twelve years instead of twenty years.

There are certain propositions which are beyond controversy. As soon as the twelve years from the date when the payment first became due, which was March 25, 1913, expired, that is to say, on March 25, 1925, the remedy in respect of the arrears of rentcharge was barred, and not only was the remedy barred, but by virtue of s. 34 of the Act of 1833 the right to claim it was extinguished. I will read s. 34: "At the determination of the period limited by this Act to any person for making an entry or distress, or bringing any writ of quare impedit or other action or suit, the right and title of such person to the land, rent, or advowson, for the recovery whereof such entry, distress, action, or suit respectively might have been made or brought within such period, shall be extinguished." It is a violent section. Its plain and simple words extinguish, after the period of limitation has run, the right and title of any person to the land and the rent for the recovery of which an entry or distress action or suit might have been made within such period; all that right is extinguished. Mr. Johnston does not dispute that from and after March 25, 1925, his position was that he could not have recovered any of the arrears by reason of the terms to which I have referred. Sect. 42 says: "No arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent . . . . shall be recovered."

Therefore, we have a case in which by March 25, 1925, the right was extinguished and the arrears were irrecoverable. What is left? What does the covenant stand to do—to pay the arrears which are irrecoverable? It is claimed that once the rentcharge has gone and the arrears have gone the re-entry cannot be exercised, but it is said on behalf of the plaintiff that the plaintiff had the right to re-enter upon the land, and the action here is for possession of the said property the subject of the rentcharge. The way in which it is put is this. It is said that a right accrued twice a year, that there was a successive right of re-entry consequent upon the failure to pay the rentcharge, that that successive right of re-entry accrued and was still in being and had not been lost, and that accordingly an action for the land could be founded upon it by virtue of the proviso with regard to re-entry. That right had not gone, although the power of enforcing payment of the rentcharge had gone. In other words, this conveyance conveyed the property subject to a defeasance which still remained good. It was a defeasance in accordance with the proviso which enabled an entry to be made; the deed did not give an absolute fee, but one which was subject to be defeated on a certain condition if that condition was not fulfilled. In other words, we have to come back to this: what is the meaning of the conveyance and of the proviso? Was this left as a right of re-entry, I will say, in gross, although the money, payment of which was to be secured and for which this proviso was the sanction, was no longer payable or recoverable? I turn, therefore, to look at the terms of the proviso. I have already read them, but I wish to emphasize this portion: in the event of the non-payment at the due date and for the space of one year after, "it shall be lawful for and the purchasers for themselves and each of them . . . . grants unto the vendor his heirs executors administrators and assigns owner or owners for the time being of the said yearly rentcharge." It is impossible to leave out those words, for they contain characteristics which must be fulfilled by the vendor, his heirs, executors, administrators and assigns, and unless those characteristics are fulfilled the vendor does not fulfil the terms of that part of the proviso. Can they be said to be "the owner or owners for the time being of the said yearly rentcharge hereby made"? The rentcharge itself is no longer payable; the right entitling them to it has become extinguished and no arrears can be recovered. In what sense are they "the owner or owners for the time being of the said yearly rentcharge"? Once you accept the view, and it is incontestable, that the right and title has been extinguished, that the arrears are irrecoverable, the rentcharge has passed into the limbo of history and there is no owner of the rentcharge, certainly no owner for the time being of the rentcharge. Therefore this proviso, which it is attempted to use in the way I have already indicated, is one which the plaintiff, his heirs, executors, administrators and assigns cannot fulfil, because they are not "the owner or owners for the time being of the yearly rentcharge."

That being so, all the structure of the argument which has been addressed to Eve J. and to us in favour of the plaintiff fails. The plaintiff, his heirs, executors, administrators and assigns are not and cannot be identified as the persons who are "the owner or owners for the time being of the said yearly rentcharge," which is no longer in existence and the arrears of which are no longer recoverable.

This seems to be a definite and vital point. The many questions which might arise on the construction of s. 3 of the Act of 1833 need not be inquired into. It is upon this ground that the whole structure of the argument for the plaintiff rests. We are unable to agree with the construction placed by Eve J. upon the deed of June 7, 1912, and the result is that we find there was not a right which the plaintiff could exercise. Accordingly the appeal must be allowed with costs here and below.

LAWRENCE L.J. Mr. Johnston, on behalf of the plaintiff, admitted that the rentcharge created by the deed of June 7, 1912, was extinguished in the year 1925 by virtue of s. 34 of the Real Property Limitation Act, 1833, no payment having been made in respect thereof since it was created. He also admitted that the extinction of the rentcharge involves the extinction of the right to recover any arrears. Notwithstanding these admissions, however, Mr. Johnston contended that the power of re-entry contained in the deed of June 7, 1912, was not barred at the date of the issue of the writ, on May 13, 1932. That somewhat startling contention was based on the proposition that the power of re-entry in default of payment of the rentcharge contained in the deed operated as a common law condition of the grant and, therefore, the purchasers under the deed took the estate granted to them upon a condition; with the result that their estate was defeasible if the condition of payment of the rentcharge be not fulfilled. Mr. Johnston relied upon the distinction between such a power of re-entry and the power conferred by s. 44 of the Conveyancing Act, 1881 (which was then in force), to enter into possession and hold the land charged and take the income thereof until thereby the rentcharge and all arrears were fully paid, the latter condition being one which was annexed to the rentcharge and would be extinguished with the rentcharge, the former being a condition not annexed to the rentcharge which would survive even although the rentcharge were extinguished. In my opinion we have not to decide that question, interesting though it may be.

The short and conclusive answer to the claim by the plaintiff in this action, in my judgment, is that upon the true construction of the deed of June 7, 1912, the power of re-entry is given to the vendor, his heirs, executors, administrators and assigns, solely in the character of "owner or owners for the time being of the rentcharge," and the rentcharge having been extinguished, the plaintiff does not fulfil the description of the "owner for the time being of the rentcharge."

On that short ground, I agree that this appeal succeeds and ought to be allowed with costs.

ROMER L.J. In my opinion, according to the true construction of the deed with which we have to deal in this case, the plaintiff is not entitled to enforce the right of re-entry given to him unless he is in a position to assert at the time that he seeks to enforce that right that he is the owner of the rentcharge which was thereby created. It is clear, and, indeed, is conceded on the part of the plaintiff, that on March 26, 1925, the rentcharge ceased to exist; that is to say, the plaintiff's title to the whole rentcharge became extinguished. At that time, therefore, his right to enforce or recover any arrears of the rentcharge came to an end. As was pointed out by the Master of the Rolls, while the rentcharge was in existence arrears could be recovered up to six years, not more than six years being recoverable having regard to s. 42 of the Act. But when the rentcharge has not been paid for twelve years, no arrears whatsoever are recoverable, because the rentcharge has ceased to exist. That being so, it being impossible for the plaintiff to assert that at the date he issued the writ in this action he was the owner of the rentcharge, the action, in my opinion, necessarily fails, and on this ground I agree that the appeal should be allowed with the consequences that have been mentioned by the Master of the Rolls.

I do not think it necessary to express any view whatsoever upon the many other interesting points that have emerged in the course of the argument.

Appeal allowed.

Solicitors for appellant: *W. H. Speed & Co., for Brooks, Davies & Co., Stockport.*

Solicitor for respondent: *J. A. K. Ferns, Stockport.*

W. I. C.

HARPER *v.* HADEN (G. N.) & SONS. ([1933] Ch. 298; 148 L.T. 303). *Principles laid down in, not applied.* ALMEROTH *v.* W. E. CHIVERS & SONS, LTD. .. [1948] 1 All E.R. 53

C. A.
1932
Oct. 14, 17;
Nov. 14.

HARPER *v.* G. N. HADEN AND SONS, LIMITED.

[1931. H. 3138.]

Highway—Obstruction—Nuisance—Erection of Scaffolding on Highway—Temporary Enclosure of Part of Highway—Licence of Local Authority—Unreasonable Use of Highway—Particular Injury to adjoining Owner—Damages—Metropolis Management Act, 1855 (18 *&* 19 *Vict. c.* 120), *ss.* 121, 122, 123.

The defendants were the tenants and occupiers of certain premises which included the upper floors of a building on the north side of Great Queen Street, in the metropolitan borough of Holborn. The plaintiff was the tenant and occupier of certain premises in the same building consisting of a shop and ground floor and a basement where he carried on the business of a fruiterer. In the summer of 1931 the defendants decided to add another storey to their premises. Before beginning to construct the additional storey the defendants on August 15, 1931, erected along the whole of their frontage in Great Queen Street a tubular scaffolding resting on the footpath, and also put up a wooden hoarding next door to the plaintiff's shop for the purpose of enclosing a space to be used during the alterations to their building for depositing bricks, rubbish, and other material brought down or going up to the top of the building. This hoarding, which was 7 ft. high, extended across the footpath for a distance of 9 ft. along the street. It had the usual platform and handrail outside it for the convenience of the public. Before placing the scaffolding and hoarding on the footpath the defendants had duly obtained the necessary licence for these erections from the surveyor of the Holborn Borough Council (the proper authority to grant such a licence). On August 28, 1931, the plaintiff commenced the present action for an injunction to restrain the defendants from obstructing the footpath of Great Queen Street, in the vicinity of his shop, by scaffolding or otherwise, and for damages for loss of custom caused by such obstruction. An application for an interlocutory injunction to restrain the defendants from maintaining the scaffolding and hoarding was refused, and the action then proceeded for trial on the question of damages. The plaintiff alleged that the obstruction of the footway caused by the scaffolding and hoarding was an illegal obstruction of the highway constituting a public nuisance, and that he had suffered particular direct and substantial damages by reason of such illegal obstruction. The defendants denied that the obstruction was illegal, and further contended that in any event damages for loss of custom were too remote.

Bennett J. held that the scaffolding and hoarding were reasonably necessary for the execution of the works, and that they did not cause any greater obstruction or remain for any longer period than was reasonably necessary. He held, however, that the obstruction was illegal and that the plaintiff was entitled to maintain the action, and awarded him 150*l.* damages.

On appeal:—

Held (by Lord Hanworth M.R. and Romer L.J.), that the obstruction to the highway and to the enjoyment by the plaintiff of his adjoining premises being of a temporary character and being reasonable in quantum and in duration did not give rise to a legal remedy, and that the plaintiff's action therefore failed.

Lingké v. *Christchurch Corporation* [1912] 3 K. B. 595 considered.

Held (by Lawrence L.J.), that as the defendants had complied with the relevant provisions in the Metropolis Management Act, 1855, and with the conditions contained in the licence granted by the Holborn Borough Council, the scaffolding and hoarding erected by them in Great Queen Street was not a wrongful obstruction of that street, and did not constitute a public nuisance, and therefore that the plaintiff had no cause of action.

Decision of Bennett J. reversed.

Appeal from a decision of Bennett J.

The defendants were the tenants and occupiers of certain premises which included the upper floors of a building on the north side of Great Queen Street in the metropolitan borough of Holborn.

The plaintiff was the tenant and occupier of certain premises in the same building consisting of a shop on the ground floor and a basement where he carried on the business of a fruiterer.

In the summer of 1931 the defendants decided to add another storey to their premises. Before beginning to construct the additional storey, the defendants on August 15, 1931, erected along the whole of their frontage in Great Queen Street a tubular scaffolding resting on the footpath and also put up a wooden hoarding next door to the plaintiff's shop for the purpose of enclosing a space to be used during the alterations to their building for depositing bricks, rubbish, and other material brought down from or going up to the top of the building. This hoarding, which was 7 ft. high, extended across the footpath and for a distance of 9 ft. along the street. It had the usual platform and handrail outside it for the convenience of the public.

Before placing the scaffolding and hoarding on the footpath, the defendants had duly obtained the necessary licence for these erections from the district surveyor of the Holborn

Borough Council (the proper authority to grant such a licence), and the plaintiff did not allege that any of the conditions of this licence had not been complied with by the defendants.

Bennett J., before whom the action was tried, found that the scaffolding and hoarding were reasonably necessary for the execution of the works and that they did not cause any greater obstruction or remain for any longer period than was reasonably necessary.

On August 28, 1931, the plaintiff commenced this action for an injunction to restrain the defendants from obstructing the footpath of Great Queen Street in the vicinity of his shop by scaffolding or otherwise and for damages for loss of custom caused by such obstruction. An application for an interlocutory injunction to restrain the defendants from maintaining the scaffolding and hoarding was refused, and the action then proceeded for trial on the question of damages.

The plaintiff alleged that the obstruction of the footpath caused by the scaffolding and hoarding was an illegal obstruction of the highway constituting a public nuisance, and that he had suffered particular direct and substantial damages by reason of such illegal obstruction.

The defendants denied that the obstruction was illegal, and further contended that in any event damages for loss of custom were too remote.

Bennett J. held that the obstruction was illegal and that the plaintiff was entitled to maintain the action, and awarded him 150*l.* damages.

The defendants appealed. The appeal was heard on October 14 and 17, 1932.

W. P. Spens K.C. and *D. Ll. Jenkins* for the appellants.

Elliot Gorst and *V. Harington* for the respondent.

The arguments sufficiently appear from the judgments.

The following authorities were cited: *Lingké* v. *Christchurch Corporation* (1); *Rex* v. *Jones* (2); *Herring* v. *Metropolitan Board of Works* (3); *Benjamin* v. *Storr* (4); *Fritz* v.

(1) [1912] 3 K. B. 595.
(2) (1812) 3 Camp. 230.
(3) (1865) 19 C. B. (N. S.) 510.
(4) (1874) L. R. 9 C. P. 400.

Hobson (1); *Ricket* v. *Metropolitan Ry. Co.* (2); *Vanderpant* v. *Mayfair Hotel Co.* (3); *Attorney-General* v. *W. H. Smith & Son* (4); *Clark* v. *Lloyd's Bank, Ld.* (5); *De Keyser's Royal Hotel, Ld.* v. *Spicer Bros., Ld.* (6); *Wedmore* v. *Mayor of Bristol* (7); *Wilkes* v. *Hungerford Market Co.* (8); *Blundy, Clark & Co.* v. *L. & N. E. Ry. Co.* (9); *Ford* v. *Metropolitan and Metropolitan District Ry. Cos.* (10); *Lyons, Sons & Co.* v. *Gulliver* (11); *Attorney-General* v. *Cole & Son* (12); *Harrison* v. *Southwark and Vauxhall Water Co.* (13); Kerr on Injunctions, 6th ed., pp. 186, 188.

Cur. adv. vult.

Nov. 14. The following written judgments were delivered:—

LORD HANWORTH M.R. This appeal raises a question which is rendered less easy of solution by reason of the decided cases.

The facts material to the point at issue lie in a narrow compass.

The plaintiff and the defendants occupy adjoining premises in Great Queen Street, Lincoln's Inn Fields.

The plaintiff carries on upon his premises the business of a fruiterer, and some of the custom which he enjoys is derived from casual purchasers who pass along Great Queen Street.

In the early part of 1931 the defendants determined to add another floor to their premises. To do this work, it became necessary to erect a scaffolding, in part outside the defendants' premises and upon the highway, and also a hoarding and a gangway carrying the footway round the hoarding, to protect the ladders and those who were working upon the job, and those who passed on the highway. The licences to erect these obstructions to the highway were obtained from those concerned. The learned judge has found, as a fact, that the obstructions were not greater than were reasonably necessary for the purpose of carrying out the operations which the defendants set out and required to do, and also that they did not continue for a longer period of time than was reasonable for the purpose of enabling the defendants to carry out and complete their alterations.

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(1) (1880) 14 Ch. D. 542.
(2) (1867) L. R. 2 H. L. 175.
(3) [1930] 1 Ch. 138.
(4) (1910) 26 Times L. R. 482.
(5) [1910] W. N. 187.
(6) (1914) 30 Times L. R. 257.
(7) (1862) 11 W. R. 136.
(8) (1835) 2 Bing. (N. C.) 281.
(9) [1931] 2 K. B. 334.
(10) (1886) 17 Q. B. D. 12.
(11) [1914] 1 Ch. 631.
(12) [1901] 1 Ch. 205.
(13) [1891] 2 Ch. 409.

But the plaintiff also established to the satisfaction of the learned judge that his weekly takings were reduced by reason of these operations, which rendered his premises less obvious to passers-by, and that he thus suffered damage to an amount estimated at one hundred and fifty pounds. The learned judge entered judgment for the plaintiff for that sum with the costs of the action. The defendants now appeal to this Court to reverse this on the ground that as the learned judge has found that the erection and obstructions were reasonable in quantum and duration, the plaintiff has not suffered any loss for which damages can be recovered from the defendants, but only such an inconvenience as he must put up with, occasioned by the reasonable conduct of the defendants upon their premises, not prolonged for an unreasonable space of time.

A long sequence of authorities and judicial pronouncements can be referred to which declare that many inconveniences of the kind in question in this action must be submitted to without there being a legal remedy in respect of them. Thus the repairing of a house may necessarily cause inconvenience to the public using the highway abutting upon it and to the neighbours: *Harrison* v. *Southwark and Vauxhall Water Co.* (1)—carts and waggons may be unloaded in proximity to premises other than those which are the destination of the goods; trenches in which are placed drains to connect with sewers, may be opened.

It is when the inconvenience is unreasonably prolonged that the public have a right to complain and the party may be indicted for a nuisance: see per Lord Ellenborough in *Rex* v. *Jones* (2); *Attorney-General* v. *W. H. Smith & Son.* (3) And in cases where an indictment for a nuisance would lie,

(1) [1891] 2 Ch. 409, 413, 414.

(2) 3 Camp. 230.

(3) 26 Times L. R. 482.

as for obstructing a public way by the deposit of earth and rubbish, a party in an action on the case can only succeed if he can prove a special injury and grievance to himself: *Hubert* v. *Groves* (1); *Rose* v. *Miles* (2); *Greasly* v. *Codling.* (3)

That injury must be the direct, necessary, natural and immediate consequence of the wrongful act: *Ricket* v. *Metropolitan Ry. Co.* (4) In *Wilkes* v. *Hungerford Market Co.* (5) a bookseller recovered the loss occasioned to his business by the diversion of customers from frequenting his shop during the time that the obstruction was unnecessary and unreasonable, but not for the time during which the obstruction was reasonable. The wrongful act was only during the former span: and it seems that the loss was treated as directly arising from the wrongful act, otherwise it would have been too remote: see per Lord Chelmsford in *Ricket* v. *Metropolitan Ry. Co.* (6)

The above principles were affirmed and illustrated in *Herring* v. *Metropolitan Board of Works.* (7) Willes J. there says (8): "It appears to me that the construction of the hoarding being necessary for the due performance of the works by the Board, and the obstruction not having been more than was necessary, or kept for an unreasonable time, would give the appellant no cause of action, and consequently no claim for compensation under the Act. Upon that short ground, I am of opinion that the decision of the magistrate was right, because damnum must mean cum not sine injuriâ. It would clearly be sine injuriâ to erect a hoarding to an extent and for a period not unreasonable. . . . These temporary inconveniences must from time to time occur everywhere: and, if an action would lie against the Metropolitan Board of Works each time a sewer is opened for repair, the burthen would be intolerable. Individuals must be content to bear these small inconveniences, in consideration of the general benefit to the public."

(1) (1794) 1 Esp. 148.
(2) (1815) 4 M. & S. 101.
(3) (1824) 2 Bing. 263.
(4) L. R. 2 H. L. 175.
(5) 2 Bing. (N. C.) 281.
(6) L. R. 2 H. L. 175, 188.
(7) 19 C. B. (N. S.) 510.
(8) Ibid. 524.

These cases establish the following propositions :—

1. A temporary obstruction to the use of the highway or to the enjoyment of adjoining premises does not give rise to a legal remedy where such obstruction is reasonable in quantum and in duration.

2. If either of those limitations is exceeded so that a nuisance to the public is created the obstruction is wrongful, and an indictment to abate it will lie.

3. If an individual can establish :

(*a*) a particular injury to himself beyond that which is suffered by the rest of the public ;

(*b*) that the injury is directly and immediately the consequence of the wrongful act ;

(*c*) that the injury is of a substantial character, not fleeting or evanescent, he can bring his action and recover damages for the injury he has suffered : see *Ricket* v. *Metropolitan Ry. Co.* (1) ; *Benjamin* v. *Storr* (2) ; *Fritz* v. *Hobson.* (3)

These conditions mean that there must be a wrongful act in the sense that the user complained of was unreasonably exercised : *Fritz* v. *Hobson* (4) ; something " exceptive and unreasonable " : *Gaunt* v. *Fynney* (5) ; and an injury thereby directly caused to the plaintiff.

In the present case the finding of the learned judge that the obstruction did not offend in quantum or duration negatives any wrongful act, and thus the plaintiff cannot recover.

But it is said that *Wilkes* v. *Hungerford Market Co.* (6) and *Herring* v. *Metropolitan Board of Works* (7) have been criticized in later cases and can no longer be regarded as sound in law. I turn, therefore, to examine them, though the words of Lord Chelmsford in *Ricket* v. *Metropolitan Ry. Co.* (8) remain and are of higher authority : " I have satisfied myself that the temporary obstruction of the highway, which prevented the free passage of persons along it, and so

(1) L. R. 2 H. L. 175, 189.
(2) L. R. 9 C. P. 400.
(3) 14 Ch. D. 542, 555.
(4) Ibid. 554.
(5) (1872) L. R. 8 Ch. 8, 12.
(6) 2 Bing. (N. C.) 281.
(7) 19 C. B. (N. S.) 510.
(8) L. R. 2 H. L. 175, 196.

incidentally interrupted the resort to the plaintiff's public-house, would not have been the subject of an action at common law, as an individual injury sustained by the plaintiff in error, distinguishing his case from that of the rest of the public. That, therefore, he altogether fails to bring himself within the general principle upon which a claim to compensation under the Acts in question has been determined to depend." Lord Chelmsford also considered the interruption of persons who would have resorted to his house but for the obstruction of the highway too remote a claim for damage to be recoverable.

Lingké v. *Christchurch Corporation* (1) is the case in which *Herring* v. *Metropolitan Board of Works* (2) was distinguished by two members of the Court of Appeal, and the third, Fletcher Moulton L.J., said that it should be treated as overruled. The facts of the case were somewhat unusual. The plaintiff was a furniture dealer, and the situation of her shop such that it was not possible to throw the soil, excavated for the purpose of laying the drain, upon any part of the roadway. The workmen were compelled to throw it against the plaintiff's house and shop, thereby stopping access to them. The plaintiff was deprived of the ordinary access to her premises for about three months, during which time, if she bought furniture it could not be delivered to her, and if she sold furniture it could not be delivered to her customers. An arbitrator awarded her damages, but the county court and Divisional Court held that she could not recover in an action upon the award. The Court of Appeal reversed this decision. Vaughan Williams L.J. (3) expressly accepts the principle on which *Herring's* case (2) was decided. "I adopt the principle: I accept it." He accepts *Ricket's* case. (4) But he holds that the facts of the case before him take it outside the principle that temporary inconveniences provide no legal injury. "The claimant has sustained injury beyond that which any of the people with houses abutting upon this highway have suffered." (5) It was the case of an exceptional

(1) [1912] 3 K. B. 595.
(2) 19 C. B. (N. S.) 510.
(3) [1912] 3 K. B. 604, 605.
(4) L. R. 2 H. L. 175.
(5) [1912] 3 K. B. 595, 605.

and unreasonable impediment being caused to the plaintiff's premises. Buckley L.J. held that the plaintiff was entitled to recover, because by s. 308 of the statute the corporation were liable to make compensation in any case in which the exercise of the statutory powers resulted in a state of facts which in the absence of the statutory powers would give a cause of action. He does not quarrel with *Herring's* case (1), as he understood the decision. Fletcher Moulton L.J.'s observations about *Herring's* case (1) are obiter. He gave his judgment upon the effect of s. 308, which gave compensation side by side with the statutory powers which justified the acts complained of: but upon terms, i.e., of paying compensation. I cannot accept that judgment as effective to destroy the principles which I have set out above, which appear to me to be illustrated by a large number of authorities. Some confusion arises in some of them, because the claims made were in respect of works done under statutory authority with a special section providing for compensation in the cases therein indicated, or under statutes incorporating the Lands Clauses Act, of which s. 68 provides for compensation for injurious affection. In some other cases the damage claimed may well be considered too remote. But these cases cannot be used as setting aside or overrruling the authorities to which I have referred for the propositions above stated. The disquisition of Willes J. in *Beckett* v. *Midland Ry. Co.* (2), while he observes upon the various cases and points out some where the damage has been held too remote, affirms them. Finally, in *Blundy, Clark & Co.* v. *L. & N. E. Ry. Co.* (3), the Court of Appeal held that a plaintiff who had suffered special and particular damage above that sustained by the public generally might recover for that damage, so far as it was occasioned by an unnecessary delay in effecting repairs to the lock which had collapsed, but not for the full time that elapsed between the collapse of the lock and its reinstatement. Greer L.J. states expressly (4), and I agree with him, that *Wilkes* v. *Hungerford Market*

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(1) 19 C. B. (N. S.) 510.
(2) (1867) L. R. 3 C. P. 82.
(3) [1931] 2 K. B. 334.
(4) Ibid. 362.

Co. (1) ought not to be considered to have been overruled. As I have pointed out above, the chief criticism directed against it is as to the remoteness of the damage, not that there was no prima facie right of action in respect of the injury suffered. The Court went over the ground again and accepted the series of authorities of which *Iveson* v. *Moore* (2) and *Rose* v. *Miles* (3) are typical examples.

On these grounds I think that the decision in *Lingké's* case (4) must be taken as depending upon its particular facts, and not as a bar to the current of authority which affirms that the plaintiff must prove that the defendant's act was wrongful, in the sense that it was unnecessary or unreasonable, and so unjustifiable. The judge has held otherwise upon the facts of the present case, and I think, therefore, that he ought not to have followed the opinion of Fletcher Moulton L.J. in *Lingké's* case (4), but to have given judgment for the defendants.

The appeal must be allowed with costs here and below.

LAWRENCE L.J. [after stating the facts as above set out and referring to the finding of Bennett J. that the scaffolding and hoarding were reasonably necessary for the execution of the works and that they did not cause any greater obstruction or remain for any longer period than was necessary, said that these matters, however, were under the special legislation hereinafter referred to for the consideration not of the Court but of the local authority who were charged with the statutory duty of determining those matters before granting the necessary licence and fixing its duration. He continued :] In these circumstances the first and main question which falls to be determined is whether the erection of the scaffolding and hoarding constituted an illegal obstruction of the street.

Counsel on both sides have contended that this question ought to be decided by applying to the facts of this case

(1) 2 Bing. (N. C.) 281.

(2) (1698) 1 Ld. Raym. 486.

(3) 4 M. & S. 101.

(4) [1912] 3 K. B. 595.

certain well established principles which may shortly be summarized as follows :—

A permanent obstruction erected in a highway without lawful authority is necessarily wrongful and constitutes a public nuisance at common law, as it in fact operates as a withdrawal of part of the highway from the public.

A temporary obstruction of the highway may or may not constitute a public nuisance according to circumstances. As a general rule such an obstruction is wrongful and constitutes a public nuisance, unless it is negligible in point of time or authorized by Parliament or occasioned in the reasonable and lawful user of the highway as a highway.

Every wrongful obstruction of the highway (be it permanent or temporary) exposes the person answerable for it to civil as well as criminal process ; in other words, is actionable as well as indictable. The fact that the highway authority has given its consent to such an obstruction affords no defence, as such consent cannot legalize that which is otherwise illegal : per Joyce J. in *Harvey* v. *Truro Rural Council.* (1)

A private individual can maintain an action in respect of a wrongful obstruction of the highway ; but, in order to do so, he must establish that he has suffered some particular, direct and substantial loss or damage beyond what is suffered by him in common with all other members of the public affected by the nuisance.

In my opinion, however, the present case does not fall to be decided by applying these general principles. In my judgment the plain and conclusive answer to the plaintiff's contention that the hoarding and scaffolding erected by the defendants in Great Queen Street constitute an illegal obstruction and therefore a public nuisance is, that Parliament has long since recognized that an owner of property abutting upon a public street in the metropolis and other towns cannot exercise his undoubted right of building, repairing or altering his house without (to some extent at least) obstructing and rendering inconvenient part of the street in front of his property, and has accordingly made special provision for regulating such obstructions with a view to public safety and convenience.

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(1) [1903] 2 Ch. 638, 645.

The relevant statutory provisions in the present case are contained in the Metropolis Management Act, 1855. Sect. 121 of that Act provides that every person who shall build or begin to build any building or wall, or alter or begin to alter the outward part of any building, or wall, shall in all cases in which the footway is thereby obstructed or rendered inconvenient, cause to be put up a proper and sufficient hoard or fence, with a convenient platform and handrail, if there be room enough for same, to serve as a footway for passengers outside of such hoard or fence, and shall continue such hoard or fence standing and in good condition during such time as may be necessary for the public safety or convenience. The section also imposes a penalty upon any person who fails to put up and maintain in good condition any such hoard or fence and platform.

Sect. 122 provides that it shall not be lawful for any person to erect or set up in any street any hoard or fence or scaffold for any purpose, or any hoards or other things by way of enclosure for (inter alia) depositing bricks, rubbish, and other materials without a licence in writing first had and obtained from the clerk or surveyor of the vestry or district board of the parish or district in which such street is situate ; and every such licence shall state the place where, and the purpose for which, such hoard or fence, scaffold or enclosure, is to be set up or made and the size thereof, and the time for which it is to be permitted to be continued.

Sect. 123 imposes a penalty on every person who erects in any street any hoard, fence or scaffold, or any boards or other things by way of enclosure without a licence from the vestry or district board, or in any other manner than as permitted by such licence, or continues the hoarding, fence or enclosure beyond the time stated in the licence.

The Act of 1855 is a Consolidation Act. Sects. 122 and 123 are taken from s. 75 of Michael Angelo Taylor's Act (57 Geo. 3, c. xxix.), and s. 121 is taken from s. 80 of the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34). In *Higgs and Hill, Ld.* v.

Stepney Borough Council (1) the Divisional Court held, in my opinion rightly, that s. 121 making it compulsory on the owner to erect a hoarding in a street in the cases therein mentioned was not inconsistent with the prohibition contained in s. 122 against erecting such a hoarding, without first obtaining a licence from the proper authority, and that therefore a licence was required before a hoarding could lawfully be erected in a street, notwithstanding that the erection of such a hoarding was made compulsory.

The effect of these enactments is that, whenever the owner of a house abutting upon a public street in the metropolis desires to repair or alter his house he is bound to erect a proper hoarding and scaffolding in the street, for the erection of which he must first obtain a licence from the proper authority, and that it is the duty of such authority in every proper case, at the request of the owners, to grant a licence for that purpose, which licence must not contain any conditions not authorized by s. 122 or by any subsequent enactment such as s. 5 of the Advertising Stations (Rating) Act, 1889, which authorizes the inclusion in any such a licence of a condition prohibiting the affixing of any advertisement to the hoarding or scaffold or sanctioning the affixing of advertisements thereto upon payment of such a sum as the authority granting the licence may determine, and provides that any payment received by the authority under that section shall be applied in aid of the rate levied for the repair of the highway.

Similar statutory provisions to those contained in ss. 121 to 123 of the Metropolis Management Act, 1855, are in force outside the metropolitan area in every urban district in England. It is every-day experience in London and all other towns throughout the country to see scaffolding and hoardings erected on the footways of streets where building operations are in progress, and in view of the legislation to which I have referred, it seems to me hopeless to contend that the scaffolding and hoardings which the owner is compelled to erect are illegal and constitute a public nuisance, unless it can be established in any particular case that they were erected without a proper licence having been first had and obtained, or were put up in a manner or at a place not authorized by the licence, or were maintained for a longer period than that authorized by the licence.

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(1) [1914] 1 K. B. 505.

In these circumstances it is not surprising that counsel have not been able to cite a single case in which it has been held or even suggested that a hoarding and scaffold temporarily erected and maintained in the streets of the metropolis for the purposes mentioned in and in strict accordance with the provisions of the Act of 1855 constituted a wrongful obstruction of such streets.

The defendants, however, for some reason I do not profess to understand, did not either in the Court below or in this Court rely upon or refer to the legislation dealing with the management and control of the streets in the metropolis, but based their defence entirely upon general principles applicable to obstructions of the highway of a totally different kind.

Only three out of the numerous cases cited by counsel contain any reference at all to obstructions of streets in towns caused by building operations of the kind undertaken by the defendants—namely, *Rex* v. *Jones* (1); *Herring* v. *Metropolitan Board of Works* (2); and *Lingké* v. *Christchurch Corporation.* (3)

In *Rex* v. *Jones* (1) the owner of a timber yard was indicted for depositing hewing and sawing logs of wood in a public street, and Lord Ellenborough in the course of giving judgment against the defendant said (4): "If an unreasonable time is occupied in the operation of delivering beer from a brewer's dray into the cellar of a publican, this is certainly a nuisance. A cart or waggon may be unloaded at a gateway; but this must be done with promptness. So as to the repairing of a house;—the public must submit to the inconvenience occasioned necessarily in repairing the house; but if this inconvenience is prolonged for an unreasonable time, the public have a right to complain and the party may be indicted for a nuisance."

(1) 3 Camp. 230.

(2) 19 C. B. (N. S.) 510, 525.

(3) [1912] 3 K. B. 595, 603.

(4) 3 Camp. 230, 231.

This case was decided five years before Michael Angelo's Act was passed, and the dictum as to the public being compelled to submit to the inconvenience occasioned by repairing a house must now be read with the qualification that the person causing such inconvenience must obtain a licence from and comply with the condition imposed by the local authority charged with the management of the streets, otherwise any obstructions caused by such repairs are clearly illegal.

In *Herring's* case (1) the obstruction complained of consisted of a hoarding occupying the whole width of a street in the metropolis erected for the purposes of enabling the defendants to construct a sewer running under the street. In the course of his judgment Byles J. said (2): "As a general rule, all the Queen's subjects have a right to the free and uninterrupted use of a public way: but, nevertheless, all persons have an equally undoubted right for a proper purpose to impede and obstruct the convenient access of the public through and along the same. Instances of this interruption arise at every moment of the day. Carts and waggons stop at the doors of shops and warehouses for the purpose of loading and unloading goods. Coal-shoots are opened on the public footways for the purpose of letting in necessary supplies of fuel. So, for the purpose of building, re-building, or repairing houses abutting on the public way in populous places, hoardings are frequently erected inclosing a part of the way. Houses must be built and repaired; and hoarding is necessary in such cases to shield persons passing from danger from falling substances." As this case was decided when the Act of 1855 was in operation it would seem as if the learned judges, when treating hoardings enclosing part of the public footway on the same footing as carts and coal-shoots had not in mind that the erection of such hoardings are on the one hand made compulsory and on the other hand prohibited by the Act unless a licence has first been obtained from the local authority, and that therefore obstructions caused by such hoardings stand on an entirely different footing from obstructions caused by carts or coal-shoots.

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(1) 19 C. B. (N. S.) 510.

(2) Ibid. 525.

In *Lingké's* case (1) the obstruction complained of was caused by the defendants laying an air main and a main drain and constructing a manhole and pumping station under and on the side of a street in the borough of Christchurch. In the course of his judgment Vaughan Williams L.J., in commenting upon the examples of lawful obstructions of the highway given by Byles J. in the above quoted extract from his judgment in *Herring's* case (2), said (3): "These are the sort of things that it is recognized people may do in respect of the highway which, although they physically obstruct, do not constitute an obstruction of the King's highway either for the purpose of indictment or for the purpose of civil action." Later on, the Lord Justice, still referring to *Herring's* case (2), said (4): "I accept the principle that every physical obstruction of a highway does not constitute an obstruction in the eye of the law. Putting it shortly, those obstructions which are absolutely necessary for the convenient and safe user of the highway are not deemed by the law to be obstructions of the highway for the purposes of indictment or for the purposes of the individual cause of action. All that was held there as not an obstruction was the hoarding, which I have already pointed out, I think, in the course of the discussion, when a house is being pulled down, is essential for the protection of the public, for the protection of the King's subjects who are using the King's highway; and you should put up such a hoarding as will prevent the stones and other things, which often result in the course of road repairing or building a house, falling upon those who are using the King's highway." The learned Lord Justice may or may not have had in mind the special legislation to which I have referred when making the statement about the obligation to put up hoardings, but it cannot be said that this statement is an authority for the legality of the erection of a hoarding and in a street without first obtaining a licence from the proper authority.

(1) [1912] 3 K. B. 595.
(2) 19 C. B. (N. S.) 510.
(3) [1912] 3 K. B. 603.
(4) Ibid. 604.

The judicial dicta contained in these three cases do not in my opinion support the proposition which I understood the defendants to contend for, that they had the free right to erect scaffolding and hoardings in Great Queen Street whenever reasonably required for rebuilding, altering or repairing their building. In view of the express prohibition contained in s. 122 of the Act of 1855 the defendants can only justify the erection of any such scaffolding and hoarding by proving that they had first obtained a licence from the proper local authority for their erection and had complied with the conditions of such licence.

Besides citing other cases where private persons have been held liable for wrongfully obstructing the highway in various ways, other than by hoardings or scaffolding erected during building operations, counsel have referred us to a number of cases of obstruction of the highway by bodies acting under Parliamentary powers where the special or general Acts under which they were acting provided for compensation being paid to persons who or whose property was thereby injuriously affected. In that class of cases it is well settled that in order to establish a claim to compensation for interference with the highway, the claimant must show that the cause of damage would have been actionable if there had been no Act authorizing such interference.

Bearing in mind that Parliamentary powers to interfere with the highway are only granted when such interference is necessary to carry out works of public utility and that such powers generally involve the power of breaking up, stopping up, or diverting the highway, it is difficult to imagine a case where a private person could lawfully cause such an interference. *Lingké's* case (1) was a case of that class. Although the obstruction there was temporary it was of such a kind that if it had been caused by a private person it would without doubt have been a public nuisance exposing him to civil as well as criminal process. The passage in the judgment of Fletcher Moulton L.J., upon which Bennett J. has based his decision in the present case, must be read in light of the facts in that case. The Lord Justice did not purport to deal with interferences by scaffolding and hoardings lawfully erected in the public streets during building operations, but was referring only to wrongful interferences with the street such as unlawfully breaking up its surface and digging trenches in it.

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(1) [1912] 3 K. B. 595.

I have not dealt more fully with the numerous cases cited by counsel because I think they are all beside the point in the present case, which in my judgment falls to be decided on the simple ground that as the defendants have complied with the relevant provisions in the Metropolis Management Act, 1855, and with the conditions contained in the licences granted by the Holborn Borough Council, the scaffolding and hoarding erected by them in Great Queen Street was not a wrongful obstruction of that street and did not constitute a public nuisance, and that therefore the plaintiff has no cause of action.

In these circumstances it becomes unnecessary to consider the defendants' second head of defence (based on the decision in *Ricket* v. *Metropolitan Ry. Co.* (1)), that the loss of custom suffered by the plaintiff was in any event too remote a damage to give him a right of private action. The point raised by this head of defence is one of some difficulty upon which I prefer not to express my opinion.

In the result I agree that this appeal succeeds and that the action ought to be dismissed with costs here and below.

ROMER L.J. In order to succeed in this action it is incumbent upon the plaintiff to show that the defendants unlawfully obstructed the highway, and that the plaintiff thereby suffered some special or peculiar damage beyond what was suffered by the rest of the public. That this is the law upon the subject is beyond controversy, though there has been some difference of judicial opinion as to what sort of special or peculiar damage would be sufficient to enable the plaintiff to maintain the action. The first matter, then, to be determined is whether the obstruction of the highway

(1) L. R. 2 H. L. 175.

admittedly caused by the defendants during the alteration of their premises was or was not an unlawful one. It was contended on the part of the appellants that they had caused no greater obstruction than they were entitled to do in exercise of a reasonable user of the highway. Mr. Spens on their behalf expressly disclaimed before us any wish to justify their acts by reason of any rights conferred or obligations imposed upon them by statute. I do not, therefore, intend to express any opinion on the point whether the relevant statutes would or would not by themselves afford an answer to the plaintiff's claim. That point was not argued before us or before Bennett J. The learned judge, however, decided that the defendants' obstruction was unlawful at common law, feeling constrained to do so, by reason of a statement made by Fletcher Moulton L.J. in giving judgment in *Lingké* v. *Christchurch Corporation*. (1) That statement was as follows: "If there is a public right such as the user of a street and it is interfered with by an individual, that interference does constitute an actionable wrong and give a right to damages to those members of the public who can prove special damage therefrom, i.e., some damage flowing to them which does not flow to ordinary members of the public." In one sense the defendants undoubtedly "interfered" with the user of the street and thereby caused, in the opinion of the learned judge, some special or peculiar damage to the plaintiff. But Fletcher Moulton L.J. did not mean that any member of the public who found himself obstructed when passing along a highway was entitled to complain of the obstruction if he thereby sustained special and peculiar damage. To have so held would have been contrary to well settled law and contrary also to common sense. No one could safely use a highway if such were the law, as was pointed out by Vaughan Williams L.J. in the same case (2): "There would be none on the highways," he said, "if every obstruction of the highways constituted a legal obstruction." The fact is of course that many obstructions of a highway are lawful and give no right of complaint, either to the Attorney-General on behalf of the public or to an individual who may thereby suffer damage. No member of the public has an exclusive right to use the highway. He has merely a right to use it subject to the reasonable user of others, and if that reasonable user causes him to be obstructed he has no legal cause of complaint. This was, indeed, recognized by Fletcher Moulton L.J. in other parts of his judgment, to which I will refer when considering, as I must now proceed to do, what is a reasonable user of a highway. For this purpose it will be sufficient to begin by referring to the statement of the law made by Lord Ellenborough in *Rex* v. *Jones.* (1) In that case the defendant, who had a timber yard adjoining a highway, had been depositing timber in the street and having it cut up there before taking it into his own premises. This was held to be an unreasonable use of the highway. " He is not," said Lord Ellenborough (2), " to eke out the inconvenience of his own premises by taking in the public highway into his timber yard." But upon the general law relating to the matter he said (2) : " If an unreasonable time is occupied in the operation of delivering beer from a brewer's dray into the cellar of a publican, this is certainly a nuisance. A cart or waggon may be unloaded at a gateway ; but this must be done with promptness. So as to the repairing of a house ;—the public must submit to the inconvenience occasioned necessarily in repairing the house ; but if this inconvenience is prolonged for an unreasonable time, the public have a right to complain, and the party may be indicted for a nuisance." The importance of this statement of the law lies, of course, for the present purpose in the recognition of the right of a person to obstruct the highway for the purpose of repairing his house so long as the inconvenience thereby caused to the public is " necessarily " so caused and it is not prolonged for an unreasonable time. This right was affirmed in greater detail by Byles J. when stating the law as to obstruction of highways in *Herring* v. *Metropolitan Board of Works.* (3) " As a general rule," he said, " all the Queen's subjects have

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(1) [1912] 3 K. B. 595, 608.

(2) Ibid. 602.

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(1) 3 Camp. 230.
(2) 3 Camp. 231.
(3) 19 C. B. (N. S.) 510, 525.

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a right to the free and uninterrupted use of a public way: but, nevertheless, all persons have an equally undoubted right for a proper purpose to impede and obstruct the convenient access of the public through and along the same. Instances of this interruption arise at every moment of the day. Carts and waggons stop at the doors of shops and warehouses for the purpose of loading and unloading goods. Coal-shoots are opened on the public footways for the purpose of letting in necessary supplies of fuel. So, for the purpose of building, re-building, or repairing houses abutting on the public way in populous places, hoardings are frequently erected enclosing a part of the way. Houses must be built and repaired; and hoarding is necessary in such cases to shield persons passing from danger from falling substances."

If the statement of the law so made by Byles J. is to be accepted as accurate, the plaintiffs must fail in their action. For Bennett J. has found as a fact that the scaffolding and hoarding complained of were reasonably necessary for the purposes of the work that the defendants were doing. We are asked, however, by Mr. Elliot Gorst, on behalf of the plaintiff, to differ from Byles J., and perhaps also from Lord Ellenborough, and to hold that the owner of a house adjoining a highway is not entitled in the course of repairing or rebuilding his house to obstruct the highway by scaffolding or hoardings, however necessary it may be to do so for the purpose of carrying out the work, and however reasonable may be the precautions he takes to minimize the inconvenience thereby occasioned to the public. This I am not prepared to do, for in my opinion the statement of Byles J. is good law and good sense. It is, moreover, supported by the high authority of Willes J. who, in the same case, said (1): "The construction of the hoarding being necessary for the due performance of the works by the Board, and the obstruction not having been more than was necessary, or kept for an unreasonable time, would give the appellant no cause of action." It is true that Fletcher Moulton L.J., in the judgment to which I have already referred, seemed to think that Byles J. had stated the law too widely, and it may be, though it is not at all certain, that he considered that the erection of scaffolding and hoardings would be an unreasonable user of the highway. But, as against this, is to be set the fact that the observations of Byles J. received the express approval of Vaughan Williams L.J. in the same case. (1) After the observations that I have already quoted, the Lord Justice proceeded as follows : " But if the user that you are making is of such a character that the people generally who use that road will find it necessary to do this, that, and the other, whether it is to stop for a time on the highway, or any of the other matters which are mentioned by Byles J. in his judgment, this is no legal obstruction. You must remember these instances begin with carts and waggons stopping at the doors of shops and warehouses. Then he takes coal-shoots ; then he takes what to my mind is a very much wider instance but equally true : ' So, for the purpose of building, rebuilding, or repairing houses abutting on the public way in populous places, hoardings are frequently erected enclosing a part of the way.' These are the sort of things that it is recognized people may do in respect of the highway which, although they physically obstruct, do not constitute an obstruction of the King's highway either for the purpose of indictment or for the purpose of civil action."

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(1) 19 C. B. (N. S.) 510, 524.

With this observation of Vaughan Williams L.J. I find myself in complete agreement. It seems to me to be eminently reasonable that the owner of a house adjoining the highway should be entitled to use it for the purpose of carrying into his house the materials necessary for repairing and rebuilding it when occasion so requires, and if in so doing he causes an obstruction of the highway not greater in degree or longer in duration than the necessity demands, the other members of the public using the highway have no ground of complaint. In *Fritz* v. *Hobson* (2) the obstruction caused by such an owner was greater than the occasion required, and he was held liable to the plaintiff who had been obstructed. But the right of the defendant to create a reasonable obstruction

(1) [1912] 3 K. B. 595, 602.

(2) 14 Ch. D. 542.

was plainly recognized by Stirling J. So, too, in my judgment, is it permissible for such an owner, subject of course to obtaining any necessary licence from the local authorities, to erect and maintain for a reasonable time scaffolding and hoardings on the highway where he could not otherwise conveniently repair or rebuild his house.

The law relating to the user of highways is in truth the law of give and take. Those who use them must in doing so have reasonable regard to the convenience and comfort of others, and must not themselves expect a degree of convenience and comfort only obtainable by disregarding that of other people. They must expect to be obstructed occasionally. It is the price they pay for the privilege of obstructing others.

For these reasons I have come to the conclusion that the plaintiff has failed to prove any unlawful obstruction of the highway, and that his action should have been dismissed.

In my opinion the appeal should be allowed with costs here and below.

Appeal allowed.

Solicitors for appellants: *Cronin & Son.*
Solicitors for respondent: *J. H. Milner & Son.*

W. I. C.

In re WALTERS' DEED OF GUARANTEE.

WALTERS' "PALM" TOFFEE, LIMITED *v.* WALTERS.

[1932. W. 3978.]

MAUGHAM J.
1933
Jan. 11.

Company—Guarantor of Preference Dividends—No Right of Action as Creditor against Company for Amounts paid under Guarantee—Subrogation to Preference Shareholders.

A guarantor of preference dividends who has made payments pursuant to the guarantee can claim only to be subrogated to the rights of preference shareholders and cannot claim to be repaid as a creditor by the company.

Principles of *Trevor* v. *Whitworth* (1887) 12 App. Cas. 409 applied.

ADJOURNED SUMMONS.

The defendant, by a deed of guarantee dated May 30, 1928, and executed by the company, himself, and a trustee for the preference shareholders, guaranteed the dividend on the company's preference shares for three years from the date of the deed. Clause 7 of the deed provided "Any sum so paid" (i.e., pursuant to the guarantee) "by the guarantor shall be forthwith repaid to him by the company on demand." By this summons the company asked (inter alia) that the defendant's rights under clause 7 might be declared, and in particular that it might be determined whether he was entitled under it to repayment by the company of any sum paid by him under the deed, or whether the provisions of the clause were ultra vires the company and void.

F. K. Archer K.C. and *Cecil Turner* for the company and the trustee for the preference shareholders, who was added as a party on the hearing.

W. F. Swords K.C. and *E. J. Heckscher* for the defendant.

MAUGHAM J. [after stating the facts :] The question arises whether clause 7 of the deed of guarantee is binding on the company. The instant that any sum is paid by the defendant to the trustee for the preference shareholders, clause 7, according to its terms, authorizes the defendant to commence an action for repayment of the sum as if he were a creditor of the company entitled to rank in the same position as any other creditor. The capital of the company might thereby be reduced otherwise than by expenditure on the objects defined by the memorandum. In my opinion, such a provision must be inconsistent with the principles in *Trevor* v. *Whitworth* (1), in which it was held that a claim against a company in liquidation by a former shareholder, for the balance of the price of shares which he had sold to the company and which the company had purported to buy under its articles, failed because the company had no power under the Companies Acts to buy its own shares, or to make, without the sanction of the Court, any payments in reduction of capital not being expenditure upon and reasonably incidental to the objects of the company. Clause 7 is not, in my opinion, dealing with any question of subrogation. It purports to place the defendant in the position of a creditor who is entitled to rights against the company quite different from the right which a preference shareholder has to payment of dividends out of profits according to the company's articles of association, and distinct from the right of a preference shareholder in a winding-up.

In my opinion, therefore, clause 7 is wholly ultra vires and void. On the other hand, preference shareholders are not entitled to be paid twice over any part of dividends which the defendant has provided for distribution among them. I therefore declare that clause 7 is wholly ultra vires and void, and that this declaration is without prejudice to any claim of the defendant to be subrogated to the rights of preference shareholders of the company as to payments which may be made in regard to preference dividends for the period of three years from May 30, 1928, or in respect of any rights of preference shareholders in a winding-up.

Solicitors: *Samuel Price, Sons & Robertson*; *Lucien Fior.*

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(1) 12 App. Cas. 409, 415, 423.

K. R. A. H.

In re AIDALL, LIMITED.

[0021 of 1931.]

C. A.
1932
MAUGHAM J.
April 26, 27.
C. A.
Nov. 15.

Company—Contributory—Fully paid up Shareholder entitled to Share in Distribution of Assets of Company—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *ss.* 124, 164, 165—*Finance Act,* 1922 (12 *&* 13 *Geo.* 5, *c.* 17), *s.* 21—*Finance Act,* 1927 (17 *&* 18 *Geo.* 5, *c.* 10), *s.* 31.

In the winding-up of a company, A. G. W. was placed on the list of contributories as the holder of 994 fully paid shares of 1*l.* each out of a total capital of 1000 shares. A. G. W. was assessed by the Commissioners under the powers given to them under s. 21 of the Finance Act, 1922, to the amount of 2069*l.* as his share of the profits of the company during two assessing periods before the winding-up. On October 18, 1929, a notice of assessment under the Income Tax Acts was given by the Special Commissioners of Income Tax. It was addressed to A. G. W. in the name of the company (in liquidation). It was an assessment to super-tax of 568*l.* 19*s.* 6*d.* in respect of the 2069*l.* The notice contained the words: "You are requested to inform the Commissioners if you elect to pay this tax." On October 19, A. G. W. returned the notice with a statement that he entirely repudiated it. On November 30, the sum of 9070*l.* 5*s.* was paid to A. G. W. in respect of his share of the surplus assets of the company by the liquidator.

The Commissioners made an application under s. 165 of the Companies (Consolidation) Act, 1908, asking for an order that A. G. W. might be ordered to refund to the company or the liquidator the sum of 568*l.* 19*s.* 6*d.* out of the 9070*l.* 5*s.*, and that that sum, being the amount of super-tax which had been assessed upon the company under s. 21 of the Finance Act, 1922, as amended by s. 31 of the Finance Act, 1927, might be paid out of the moneys so refunded. A. G. W. disputed both the jurisdiction of the Court and the propriety, if there were a jurisdiction, of making the order, or any part of the order, asked for:—

Held, by Maugham J. and the Court of Appeal (1.) that A. G. W. had properly been put upon the list of contributories, notwithstanding the definition of "contributory" in s. 124 of the Act of 1908; (2.) that A. G. W., having received moneys from the liquidator upon a distribution of surplus assets of the company in liquidation, with notice that the liquidator had not provided for payment of a debt due by the company, ought to be ordered to pay the amount of the debt to the credit of the liquidator's account at the Bank of England.

In re Marlborough Club Co. (1868) L. R. 5 Eq. 365 distinguished.

ADJOURNED SUMMONS.

This was an application by summons, dated March 18, 1932, by His Majesty's Attorney-General, on behalf of His Majesty, the respondents to which were J. E. Baldwin, the liquidator of the company, and Arthur George Whiteman and Arthur Percy Whiteman as administrators of the estate of Alice Maud Whiteman. The summons asked for an order "that the respondents Arthur George Whiteman and Arthur Percy Whiteman may be ordered to refund to the company or to the respondent liquidator a sum of 568*l.* 19*s.* 6*d.*, together with a sum equal to the costs of the applicant of this application, out of the sum of 9070*l.* 5*s.* paid to them out of the assets of the company by the respondent liquidator, and that the sum of 568*l.* 19*s.* 6*d.*, being the amount of super-tax which has been assessed upon the company under s. 21 of the Finance Act, 1922 (as amended), and the applicant's costs of this application may be paid out of the moneys so refunded."

The company was incorporated on November 12, 1912. In 1920–21 Mrs. A. M. Whiteman acquired 999 shares out of the 1000 shares issued and became sole director. In September, 1926, Mrs. A. M. Whiteman died. Her executors held 994 shares. Miss V. A. Whiteman held five shares and was appointed sole director. The company was voluntarily wound up by special resolution, confirmed on April 4, 1929, and the respondent, Baldwin, was appointed liquidator. He found that the 994 shares had been entered in the register of members as being held by the executors of Mrs. A. M. Whiteman, without naming them. Before the winding-up he had been secretary of the company, and in his affidavit he said that as Arthur George Whiteman, one of the administrators of Mrs. A. M. Whiteman, claimed that the whole of the capital of the company was his on the ground that it had been provided by him, and that Mrs. A. M. Whiteman was merely his nominee, he claimed the right to receive the assets of the business as they came in, and, accordingly, as those assets were realized they were paid into the business account of A. G. Whiteman. The Court did not accept the claim put forward by A. G. Whiteman that he was entitled as between himself and the liquidator, because he said Mrs. A. M. Whiteman was his nominee, to have payment of the sums that were realized by the liquidator during the winding-up of the company, unless they were paid to him as administrator. The certificate of the liquidator, dated May 15, 1930, certified that a return of surplus assets was declared payable to contributories on November 30, 1929, at the rate of 9*l.* 2*s.* 6*d.* per share, and that the sum of 9070*l.* 5*s.* had been paid to A. G. Whiteman in respect of his 994 shares. Under the name A. G. Whiteman appeared the words, in brackets, " per exors. of the late Mrs. A. M. Whiteman."

Sect. 21, sub-s. 1, of the Finance Act, 1922, provides that: " Where it appears to the Special Commissioners that any company to which this section applies has not, within a reasonable time after the end of any year or other period . . . . for which accounts have been made up, distributed to its members in such manner as to render the amount distributed liable to be included in the statements to be made by the members of the company of their total income for the purposes of super-tax, a reasonable part of its actual income from all sources for the said year or other period, the Commissioners may, by notice in writing to the company, direct that for purposes of assessment to super-tax, the said income of the company shall, for the year or other period specified in the notice, be deemed to be the income of the members, and the amount thereof shall be apportioned among the members." On July 3, 1929, the Special Commissioners gave a notice to the liquidator requiring: (1.) A statement of the actual income of the company from all sources for each year or other period for which the company's accounts had been made up, ended on any date subsequent to April 5, 1927; (2.) a copy of the company's accounts for each year or other period for which the company's accounts had been made up, ended on any date subsequent to April 5, 1927; (3.) a statement giving full particulars of the manner in which the income of the company for the periods referred to had been dealt with; and (4.) a statement of the names and addresses and particulars of the respective interests of all members of the company for the periods referred to. On July 9 the liquidator replied, giving the particulars required. In these particulars the company's accounts were made up for the year ending March 31, 1928, and for the period from April 1, 1928, to April 4, 1929, and the executors of Mrs. A. M. Whiteman were given as shareholders during those periods. Further correspondence ensued, and on August 30, 1929, the Commissioners wrote to the liquidator to say that they had directed, in accordance with the provisions of s. 21 of the Finance Act, 1922, that, for the purposes of assessment to super-tax the income of the company for the year ended March 31, 1928, should be deemed to be the income of the members, and they apportioned the sum of 2069*l.* 10*s.* 3*d.* to A. G. Whiteman. That was accompanied by a formal notice, which was served on the liquidator, and by a letter in which it was stated that if the company was aggrieved by the direction it might, within twenty-one days, appeal to the Special Commissioners. On September 16 notice of appeal was given on behalf of the liquidator, but on October 8 the appeal was withdrawn. On October 18 a notice of assessment under the Income Tax Acts was given by the Special Commissioners. It was addressed to A. G. Whiteman in the name of Aidall, Ld. (in liquidation). It was an assessment of super-tax of 568*l.* 19*s.* 6*d.* in respect of the 2069*l.* The notice contained these words: "You are requested to inform the Commissioners if you elect to pay this tax. If you do not within twenty-eight days of the date hereof elect to pay the tax, a notice of charge will be served on the company and the tax will thereupon become payable by the company." That followed the terms of s. 21, sub-s. 3, of the Finance Act, 1922. On October 19 that notice was returned to the Special Commissioners, together with a statement that A. G. Whiteman entirely repudiated it.

On December 5 notice of assessment was served on the liquidator. There then ensued further correspondence between the Special Commissioners and the liquidator, and on January 23, 1930, they wrote and informed him that unless the 568*l.* 19*s.* 6*d.* was paid on behalf of the company within fourteen days they would refer the matter to the Solicitor of Inland Revenue with a view to the institution of legal proceedings for its recovery. The Court was of opinion that, having regard to the various notices given by the Special Commissioners, the company became liable to pay the 568*l.* 9*s.* 6*d.* on December 5, 1929, and that the liquidator, having distributed the assets of the company, became personally liable as from that date. The Special Commissioners, however, decided that it was useless to proceed against the liquidator, and the present application was made under s. 165 of the Companies (Consolidation) Act, 1908. The respondents disputed both the jurisdiction of the Court and the propriety, if there was a jurisdiction, of making the order, or any part of the order, asked for.

J. H. Stamp for the Attorney-General.
Hector Hughes K.C. and *S. R. Benson* for A. G. Whiteman.
Granville Sharp and *H. Edmund Davies* for A. P. Whiteman.

MAUGHAM J. This case raises two points of some complexity and difficulty. It is an application by His Majesty's Attorney-General, on behalf of His Majesty, and it seeks an order. [His Lordship read the order asked for, and continued :] The jurisdiction to make the order is asserted to be given to the Court under s. 165 of the Companies (Consolidation) Act, 1908, which is applicable in this case, having regard to the circumstance that the liquidation took place in the year 1929. The respondents dispute both the jurisdiction of the Court and the propriety, if there is a jurisdiction, of making the order, or any part of the order, that is asked for.

I have first to consider the sections applicable. I think ss. 164 and 165 of the Act of 1908 are closely connected. Sect. 164 is as follows : " The court may, at any time after making a winding-up order, require any contributory for the time being settled on the list of contributories, and any trustee, receiver, banker, agent, or officer of the company to pay, deliver, convey, surrender, or transfer forthwith, or within such time as the court directs, to the liquidator any money, property, or books and papers in his hands to which the company is prima facie entitled." Sect. 165 provides: "(1.) The court may, at any time after making a winding-up order, make an order on any contributory for the time being settled on the list of contributories to pay, in manner directed by the order, any money due from him or from the estate of the person whom he represents to the company, exclusive of any money payable by him or the estate by virtue of any call in pursuance of this Act. (2.) The court in making such an order may, in the case of an unlimited company"—do certain things—"and may, in the case of a limited company, make to any director or manager whose liability is unlimited or to his estate the like allowance"; that is an allowance by way of set-off of any money due from him, or the estate which he represents, to the company.

The first question to be determined is whether the jurisdiction of the Court summarily to direct Mr. A. G. Whiteman, or any other person, to pay any money due from him, or from the estate of the person whom he represents, to the company is one which is applicable, notwithstanding the fact that Mr. A. G. Whiteman is the holder (as a representative) of fully paid up shares. It is alleged, on behalf of the present respondents, that a contributory in this section means somebody who is liable to contribute to the assets of the company in respect of his shares; in other words, that it is limited to the definition as found in s. 124 of the Act of 1908, which provides that the term "contributory" means "every person liable to contribute to the assets of a company in the event of its being wound up, and, in all proceedings for determining and in all proceedings prior to the final determination of the persons who are to be deemed contributories, includes any person alleged to be a contributory." It is unfortunate that in this Act, and in the Acts which it supersedes, the term "contributory" is used in a large number of places, not as limited to holders of partly paid shares, but as including holders of fully paid shares in the company. In the series of sections, ss. 123 to 128, which are headed with the word "Contributories," I am of opinion that the word "contributories" is used in the narrow sense —namely, the holders of partly paid shares; but when we pass from that series of sections to the later series, for instance, those headed "Winding-up by Court," those headed "Liquidators," those headed "Committee of Inspection," and, finally, those headed "Ordinary Powers of Court," in which ss. 164 and 165 are found, it is clear that the word "contributories" is really used as synonymous with the word "members." In s. 137, which deals with the parties who may apply to the Court for winding-up a company, it is obvious that a contributory includes a holder of fully paid up shares. In s. 138 the word "contributory" again must be used in the same wide sense. In s. 144, which deals with the power of the Court to stay the winding-up, it is again obvious that "contributory" includes the holder of fully paid up shares. In s. 145, the well-known section which provides that the Court may, as to all matters relating to a winding-up, have regard to the wishes of the creditors or the contributories, as proved to it by any sufficient evidence, it is plain that "contributories" has the wider meaning. The same is true as regards s. 147, sub-s. 6; it is true as regards the meetings of contributories mentioned in s. 152; it is true as regards the payments referred to in s. 154; it is true as regards s. 157, which includes a reference to adjusting the rights of the contributories amongst others. Again, in s. 158 the directions that may be given by contributories at general meeting must include directions given by fully paid up shareholders, and the same is true as regards sub-s. 2 of that section. Sect. 160 refers to a committee of creditors and contributories of the company, and "contributories" there cannot be limited to people who are the holders of partly paid shares. Among the sections headed "Ordinary Powers of the Court" there are again a number of sections in which the word "contributories" must be used in the wider sense; for instance, in ss. 166, 167, 168, 170 and 173; and I might add that one may go on through other sections of the Act which are expressed in the same way, e.g., ss. 191, 193, 197, 219, 220, which are all sections which use the word "contributory" as synonymous with the word "member." Turning now to ss. 164 and 165, I have to observe that I am dealing with a jurisdiction which the Court may exercise as against persons described as contributories "for the time being settled on the list of contributories." In my opinion the proper course there is to hold that "contributory" is not limited to the narrower meaning of persons who owe money to the company in respect of their shares, but that unless such a shareholder is for the time being settled on the list of contributories the Court has no jurisdiction under these sections. It may also be correct to hold that the Court will refuse to exercise its jurisdiction by putting somebody who is not on the list of contributories upon the list *merely* for the purpose of obtaining jurisdiction under either of the two sections. It is evident that there is a considerable distinction between the case of members of a company who have fully paid up shares and who have no prospect of obtaining anything in the division of the surplus assets of the company, and the case of holders of fully paid up shares who are entitled to a return in the winding-up after all the liabilities of the company have been discharged. It may be that the list of contributories which is referred to in s. 164 and s. 165 is a list of the persons who either owe money to the company in respect of their shares, or who are entitled, on a distribution, to a share in the surplus (as mentioned in s. 170 of the Act), but the jurisdiction is only conferred against persons of whatever class they are who are "settled on the list of contributories."

In the present case I have not had produced to me a document which appears to be the original list of contributories as made out by the liquidator, but I have the fact that upon the file he has certified a return of surplus assets to the three contributories who alone were entitled to share in the distribution of the surplus assets of the company; and Arthur George Whiteman, who was practically the sole shareholder in the company, with the exception of only six shares, is the first person on that list. I do not think that it is necessary for me to speculate as to whether the liquidator ever, in this case, made out a single separate document which he headed "List of Contributories," and in which he inserted the names of the three persons entitled to share in the surplus assets. I think, however, that I am bound to hold that, at the date when he declared that the surplus assets were payable to three ascertained contributories, according to a particular list, he made a sufficient list of contributories for the purpose of the distribution, and that that list included the name of Arthur George Whiteman. In my opinion, therefore, I have a jurisdiction against Arthur George Whiteman as being a person fairly to be described as a contributory for the time being settled on the list of contributories within the meaning of s. 165 of the Act of 1908.

A number of cases have been cited to me for the purpose of showing that that is not the correct view. The only one which I think is at all relevant is *In re Marlborough Club Co.* (1) If I thought that that case was applicable, I should certainly follow it, because it has been cited in the text-books for very many years, and it never appears to have been doubted. In my opinion, however, it does not deal with the precise point with which I have to deal here. The headnote is: "A holder of fully paid-up shares in a company, although indebted to the company, cannot be put on the list of contributories." It was a case of a club called the Marlborough Club, Ld., incorporated under the Companies Act, 1862, for the purpose of carrying on a club-house in the county of Middlesex under certain rules. In November, 1866, the company was ordered to be wound up. The official liquidator proposed to settle a supplemental list of contributories containing the names of holders of fully paid-up shares who were indebted to the company for arrears of their annual subscriptions, and small sums in respect of refreshments, etc., furnished by the club; and an application was made to the Court for that purpose. Lord Romilly refused to allow the application. He said (2): "The persons sought to be put on the list are holders of fully

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(1) L. R. 5 Eq. 365.

(2) L. R. 5 Eq. 365, 367.

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paid-up shares, and are only sought to be made contributories for the purpose of giving the Court jurisdiction over them as debtors to the company. Now, the Court is not in the habit of settling a supplemental list and I find nothing in the Act which enables a supplemental list to be made. On the contrary, the 101st section shews that persons on whom orders are made under it must be already settled on the list." Sect. 101 of the Companies Act, 1862, is the same, in substance, as the section with which I am now dealing, s. 165, and it contains the words: "The Court may . . . . make an order on any contributory for the time being settled on the list of contributories." Those are the words that Lord Romilly is referring to. Then he goes on to say: "Unquestionably these gentlemen could not be settled on the list in the first instance, and I cannot put them on solely to give the Court jurisdiction to enforce payment of the debts due from them. The liquidator must recover these debts in the County Court in those cases where the sums are small, and where they are large he must bring actions in the usual way." That, I think, clearly is a case where the company was insolvent, and there was nothing distributable to the members of the company, and it was a case where the members of the company who were, of course, ordinary club members, objected to being put on the list, because they had paid for their shares in full, and they thought that they would prefer actions to be brought against them by the liquidator in the county court, or otherwise, rather than be put on the list and be subjected to the summary jurisdiction of the Court. Lord Romilly said that they were right. Here, however, I have a case where a member of the company, as I read the facts in evidence before me, has been put upon the list of contributories in order that he might, in that capacity, receive a sum of no less than 9070*l.* 5*s.*, a sum which he has received either in cash or by means of a settlement of other liabilities due from him to the company. I come to the conclusion, therefore, that Mr. A. G. Whiteman is a person for the time being settled on the list of contributories, and that he is accordingly subject to the jurisdiction of the Court under s. 165. I should add that there is a strong reason for not limiting the jurisdiction of the Court with regard to the contributories settled on the list for the time being; for it would be unfortunate in the case of a fully paid up shareholder who has large claims in the surplus assets of the company, but who happens to owe money to, or has property in his hands to which the company is prima facie entitled, to have to hold that the Court has no jurisdiction in a summary manner to settle all questions as between him and the company. I accept the decision of Lord Romilly as showing that the jurisdiction rests upon the fact that a man has been, for the time being, settled on the list, but I do not accept it as showing that Mr. A. G. Whiteman could not properly have been settled on the list. I am of opinion that where it is possible that surplus assets will be divisible in the winding-up of the company to the shareholders, fully paid-up shareholders ought to be on a list of contributories, and I think that the fact is shown not only by the sections of the Act to which I have referred, but also, perhaps even more distinctly, by the Winding-up Rules of 1909, including, in particular, r. 151.

That applies to Mr. A. G. Whiteman, but as regards the other respondent, Mr. Arthur Percy Whiteman, I am unable to say that I have, according to the view that I have formed of the section, any jurisdiction against him at all. I have no evidence to show that he has been settled for the time being on the list of contributories, and therefore, as against him, I think that no order can be made. The question remains whether Arthur George Whiteman, who, as I have held, is within the jurisdiction, ought to be ordered to repay this sum of 568*l.* 19*s.* 6*d.* to the respondent liquidator? To my mind the facts are reasonably clear. He received the sum knowing perfectly well that the sum was a debt which ought to have been provided for by the liquidator. It was a sum assessed under s. 21 of the Finance Act, 1922, upon him in the name of the company. He elected not to pay the tax in question, knowing that as a result the tax would thereupon become payable by the company, and with that knowledge I do not think that there can be any doubt but that, having received a much larger sum as a dividend in the winding-up, he is liable to repay the sum of 568*l.* 19*s.* 6*d.* to the liquidator for the purpose of the liquidator discharging the debt of the company to the Inland Revenue, and I so hold. Accordingly I think that the proper order will be that the respondent Arthur George Whiteman is liable to refund the sum of 568*l.* 19*s.* 6*d.* out of the assets of the company received by him, and that he be ordered to pay such sum to the credit of the liquidator's account at the Bank of England.

P. J. B.

C. A. The respondent A. G. Whiteman appealed. The appeal was heard on November 15, 1932.

Granville Sharp for the appellant.
J. H. Stamp for the Crown was not called upon.

LORD HANWORTH M.R. Mr. Sharp has said all that there is to be said in favour of this appeal, and he has quite candidly said he has a difficult case. I agree with him. Really it is impossible to add usefully to what has been said by Maugham J. The truth of the matter is that the money was first of all paid to Mr. A. G. Whiteman because he stood, and was returned on the list of contributories, as the owner of 994 shares. It was in that capacity that he had paid over to him a sum of money by way of distribution of surplus assets. It now appears that the sum so paid over to him was too large, and that provision had not been made for a debt due from the company to the Inland Revenue. The money is now asked for by way of return from the person who has been overpaid. He has received too much from the company, and he must repay some portion of that money, which never ought to have been handed over to him and which is needed for the purpose of paying the debts of the company. The matter really is plain. The sections which have to be dealt with are intricate, and I would not add anything to what Maugham J. has said. The appeal is to be dismissed with costs.

LAWRENCE L.J. I agree.

ROMER L.J. I agree.

Appeal dismissed.

Solicitors for appellant: *Edwin E. Clark & Son.*
Solicitor for Crown: *Solicitor of Inland Revenue.*

W. I. C.

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In re HICKS.

BACH *v.* COCKBURN.

[1932. H. 3953.]

Will—Estate Duty—Settled Legacy—Incidence of Duty—"Free from all death duties"—"Presently or presumptively or prospectively payable"—Finance Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 10), *s.* 14.

A testator by his will dated February 24, 1930, after giving several pecuniary and specific legacies, directed by clause 6 that all the pecuniary legacies and specific bequests and devises given by his will "shall be free from all death duties which (whether presently or presumptively or prospectively payable) shall be paid out of any general personal estate."

He then directed his executors to invest a sum of 5000*l.* upon trust to pay the income to his daughter L. M. S. during her life with provision for forfeiture in certain events and after her death or forfeiture to hold the investments in trust for her daughter A. S. absolutely. He devised and bequeathed his residuary real and personal estate to his executors upon trust for sale and conversion and out of the proceeds (inter alia) to pay his testamentary expenses (including all estate duty leviable at his death in respect of his residuary estates. The testator died on December 6, 1931. Questions arose whether under the terms of the will the estate duty which would become payable on the death of the daughter and the legacy duty which might become payable in the event of the forfeiture of her life interest would be payable out of the residuary estate or out of the settled legacy:—

Held, that as the words used in clause 6 were found in precedent books published prior to the passing of the Finance Act, 1914, they could not be held to apply exclusively to the future estate duties imposed by that Act, that the words of the will showed that the mind of the testator

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was directed to the duties payable at his death, and did not provide a context which would justify a more extended construction being imposed upon clause 6, and that the estate duties which would become payable on the death of the tenant for life upon the settled legacy would not be payable out of the residuary estate, but the legacy duty would be so payable.

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George Hicks, of Broadlands, 57 Effra Road, Brixton, by his will dated February 24, 1930, appointed Albert Herbert Bach and James Ball his executors and trustees of his will, and after giving certain specific and pecuniary legacies by clause 6 declared that "all the pecuniary legacies and the specific bequests and devises given bequeathed and devised respectively by this my will shall be free from all death duties which (whether presently or presumptively or prospectively payable) shall be paid out of my general personal estate."

By clause 7 he gave to his executors the sum of 10,000*l.* "free from death duties," and directed his executors to purchase with the sum of 5000*l.* (part of the said sum of 10,000*l.*) an annuity for the life of his daughter Lucy Mary Sharpe, to commence from the date of the purchase of the annuity and to be paid quarterly with a provision for forfeiture on alienation, in the event of which forfeiture the annuity was to be paid to his trustees during the remainder of her life to be applied at the absolute discretion of his trustees for maintenance, support or benefit of his said daughter and her daughter Agnes Sharpe and any children or child of the said Agnes Sharpe, and directed that so much of the annuity as should not be applied by his trustees should be added to the shares or share in his residuary estate destined for such of five named persons as should be living at his death.

The testator directed that his executors should invest the sum of 5000*l.*, being the balance of the said sum of 10,000*l.*, in the names of his trustees upon certain investments therein specified and that his trustees should hold the said sum of 5000*l.*, or the investments for the time being representing the same, upon trust to pay the income to his said daughter during her life for her separate use without power of anticipation with a similar provision for forfeiture on alienation and a power for his trustees after forfeiture in their absolute discretion to apply the income or any part thereof for the support or benefit of all or any of his said daughter and the said Agnes Sharpe and any children of the said Agnes Sharpe, and a provision that any part of the income not so applied should be added to the shares of his residuary estate destined for the same five persons as in the case of the said annuity; and after the death of his said daughter the testator directed that his trustees should hold the capital and income of the said sum of 5000*l.* in trust for the said Agnes Sharpe absolutely.

The testator devised and bequeathed all his residuary real and personal estate to his executors upon trust for sale and conversion and upon trust out of the proceeds to pay his funeral and testamentary expenses (including all estate duty leviable at his death in respect of his residuary estate), debts and legacies and all death duties and other moneys which under or by virtue of any direction or bequest free of duty contained in his will or any codicil thereto were payable out of his residuary estate and to provide for any annuities. He directed that his trustees should hold the residue of his trust fund in trust for all of five persons there named as should be living at his decease, and if more than one in equal shares as tenants in common.

The testator made two codicils to his will dated respectively February 6, 1931, and March 19, 1931, neither of which affected clauses 6 or 7 of his will. The testator died on December 6, 1931, and his will and the said two codicils were proved by the executors named in the will in the Principal Probate Registry on January 26, 1932. His daughter, Mrs. Sharpe, survived him. In the administration of the testator's estate a question arose whether the estate duty, which will become payable upon the death of Mrs. Sharpe, upon the settled legacy of 5000*l.* should be borne by that legacy or by the residuary estate. A further question arose how, in case

Mrs. Sharpe did anything to forfeit her interest in the legacy, the legacy duty which might then become payable should be borne.

In order to obtain a decision on these questions the executors issued this summons on October 14, 1932, to which Agnes Sharpe (now Mrs. Agnes Cockburn), as the reversioner of the settled legacy, and one of the residuary legatees were defendants, asking whether upon the true construction of the will (*a*) the legacy duty and (*b*) the estate duty which will become payable upon the death of Mrs. Lucy Mary Sharpe in respect of the settled legacy of 5000*l.* will be payable out of the residuary estate or out of the settled legacy.

J. V. Nesbitt for the trustees.

G. P. Slade for Mrs. Cockburn. The direction in clause 6 is very wide, and sufficient to cast the payment of all death duties payable on the death of the tenant for life upon the residuary estate. It would not be easy to find more comprehensive words than "whether presently or presumptively or prospectively payable." In *In re Wedgwood. Allen* v. *Public Trustee* (1) the Court of Appeal said that a testator might by apt words throw the burden of future duties upon his residuary estate, if he desired to do so, notwithstanding the inconvenience which might be caused thereby. Here, I submit, the words are quite apt to do so. A duty payable on the falling in of a life interest is "prospectively payable." It is true that in a case of *In re Barratt. Coates* v. *Barratt* (2) the Court of Appeal, affirming Farwell J. in a case where the same words were used, held that the words were not sufficient to throw the burden of future duties, not payable at the testator's death, on the residuary estate. But that was rather a special will and widely different from the present will, and moreover the will there was made and the testator died before the Finance Act, 1914, was passed, when the testator could not have anticipated the new duties created by that Act. *In re Stoddart* (3), I submit, supports my contention. The legacy duty is clearly payable out of the residuary estate: *In re Wedgwood.* (1)

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(1) [1921] 1 Ch. 601.

(2) Unreported. C. A. 1930, March 2.

(3) [1916] 2 Ch. 444.

L. Morgan May for the residuary legatee. I submit that both the estate duty and the legacy duty which will become payable on the settled legacy will be payable out of the legacy and not out of the residuary estate. There have been many cases dealing with the question, but in *In re Wedgwood* (1) Lord Sterndale said that in each case the decision must turn on the construction of the will in question, and that any direction to make the future duties chargeable upon the residue must be in clear words. The words used in clause 6, "presently or presumptively or prospectively payable," are the same as those used in *In re Barratt. Coates* v. *Barratt* (2), in which both Farwell J. and the Court of Appeal held that, notwithstanding the use of the word "prospectively," the duties were not chargeable on the residuary estate. These words appear to be taken from Key and Elphinstone's Precedents of Conveyancing, and are used in editions long prior to the Finance Act, 1914, and cannot be held to refer only to the duties made payable under that Act.

On the construction of the will it may be that the testator only intended clause 6 to refer to the legacies already given. But if it applies to the whole will, it is possible to find sections in the Finance Acts and Customs Acts postponing payment of duties to which the words "presumptively or prospectively" would apply without any question of the duties under the Finance Act, 1914.

By s. 61, sub-s. 5, of the Finance (1909–10) Act, 1910, as amended by s. 9 of the Finance Act, 1912, the payment of estate duty on growing timber may be postponed until it is sold. Sect. 33 of the Legacy Duty Act, 1791, allowed the postponement of the payment of legacy duties in certain cases: see Hanson on Estate Duties (7th ed.), 370. By s. 6 of the Finance Act, 1894, the payment of estate duty may be made by instalments. By s. 11 of the Customs and Inland Revenue Act, 1880, legacy duty and succession duty are referred to as "presumptively" payable, and by s. 43 of the Customs and Inland Revenue Act, 1881, the Commissioners can accept a composition for future legacy duty. As to the words necessary to throw the burden of future duties on the residuary estate, see *In re Beecham. Woolley* v. *Beecham.* (1) I submit that both the future estate duty and legacy duty are to be borne by the settled legacy.

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(1) [1921] 1 Ch. 601.

(2) Unreported (1930).

Cur. adv. vult.

Dec. 21. EVE J. This summons raises the familiar question: what duties upon the true construction of the testator's will are payable out of his residuary estate. The will is dated February 24, 1930; there were two codicils dated February 6 and March 19, 1931; and the testator died on December 6 in the same year. After making various specific and pecuniary bequests, the testator by clause 6 of his will declared that "All the pecuniary legacies and the specific bequests and devises given bequeathed and devised respectively by this my will shall be free from all death duties which (whether presently or presumptively or prospectively payable) shall be paid out of my residuary estate." By clause 7 he gave to his executors the sum of 10,000*l.* free from death duties, and after directing them to purchase with the sum of 5000*l.* (part of the said sum of 10,000*l.*) the annuity therein mentioned, directed them to invest the sum of 5000*l.*, the balance of the said sum of 10,000*l.*, in the names of his trustees in or upon the investments therein mentioned, and declared that his trustees should hold the said sum of 5000*l.* and the investments for the time being representing the same upon trust to pay the income thereof to his daughter, Lucy Mary Sharpe, during her life or until forfeiture as therein mentioned, and after the death of the said Lucy Mary Sharpe upon trust as to both capital and income for her daughter, the defendant Agnes Cockburn (then and in the will described as Agnes Sharpe) absolutely. By clauses 9, 10 and 11 the

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(1) (1923) 130 L. T. 558.

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testator devised and bequeathed his residuary real and personal estate to his executors upon trust that they should sell and convert the same into money, and should thereout pay his funeral and testamentary expenses (including all estate duty leviable at his death in respect of his residuary estate), and debts and legacies, and all death duties and other moneys which under or by virtue of any direction or bequest free of duty contained in his will or any codicil thereto were payable out of his general estate, and should hold the residue of the said moneys in trust for the five persons therein named in equal shares as tenants in common.

By his first codicil the testator revoked a legacy of 100*l.* bequeathed by clause 4 of his will, and in lieu thereof bequeathed to the legatee the sum of 500*l.* free from all death duties. He also bequeathed a number of other pecuniary legacies free from all death duties.

The estate duty payable on the occasion of the testator's death has been duly paid, and the question raised by this summons is whether upon the true construction of the will and codicils the estate duty which will become payable in respect of the settled legacy of 5000*l.* upon the death of Mrs. Sharpe will be payable out of the settled legacy or out of the residuary estate of the testator.

In answering this question regard must be had to the whole will and in particular to clause 6. At first sight, seeing that this will was executed many years after the coming into operation of the Finance Act, 1914, and that several cases dealing with the subject-matter, including *In re Wedgwood* (1), had been reported and freely discussed, it did occur to one's mind that the draftsman of this clause had introduced language sufficiently wide to cover duties of any description, and whenever payable. But the considerations responsible for this impression were badly shaken when it was discovered that the identical language of clause 6 had been employed by a testator, whose will dated in 1911 came up for consideration by Farwell J. in 1929 and by the Court of Appeal in 1930. (1) The identity of language clearly pointed to a common origin, and the industry of counsel in this case has traced it through successive editions of Key and Elphinstone's Precedents of Conveyancing as far back as 1904. It is obvious, therefore, that it could not have been framed to meet the changes brought about by the Finance Act, 1914, and this leads to the question whether there were before the passing of that Act any, and if so, what, duties to which the language would be applicable. The answer is, I think, disclosed in a note to the clause on p. 801 of the second volume of the 9th ed. of Key and Elphinstone's Precedents, published in 1909, which is the one I have before me and in which the learned editors say: "As to duty presumptively or prospectively payable, see the Customs and Inland Revenue Act, 1880 (43 Vict. C. 14), section 11, and the Customs and Inland Revenue Act, 1881 (44 & 45 Vict. C. 12), section 43, superseded in effect by the Finance Act, 1894, section 13."

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(1) [1921] 1 Ch. 601.

These references relate to sections sanctioning the commutation of duties "presumptively payable" for a sum to be presently paid, and to the powers of the Commissioners to accept a composition for all or any of the death duties. Mr. Morgan May, in his lucid and helpful argument, supplemented the above note by reference to s. 6, sub-s. 8, of the Finance Act, 1894, affording an option to pay estate duty by annual or half-yearly instalments, and to s. 9 of the Finance Act, 1912, postponing the obligation to pay estate duty on standing timber.

But, although it is clear that the language of clause 6 in this will does not owe its origin to the Act of 1914, in that in its origin it was directed to duties leviable on the death of a testator under Acts passed before 1914, it does not follow that it is in all cases restricted to those duties. The language, and in particular the words "prospectively payable," may well be construed, in some cases, as extending to prospective duties payable upon a settled legacy on some

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(1) *In re Barratt.* Unreported.

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event happening at a date subsequent to the testator's death, if there is a context which so requires.

The question, therefore, is whether there is to be found in this will any context or provision which requires that the words of clause 6 should be so construed as to extend to prospective duties beyond those leviable at death.

I do not think that there is. It is to be noted that the bequest of the fund out of which the settled legacy is to be provided follows in clause 7 immediately after clause 6, and that it is bequeathed "free from death duties," and that in the clause dealing with the residue the testator makes provision for "all estate duty leviable at my death." These references afford, I think, some indication that the testator's mind was directed to the duties payable at his death, and they certainly do not provide a context which would justify the more extended construction being imposed on clause 6.

I hold, therefore, that the estate duty which will become payable upon Mrs. Sharpe's death in respect of the settled legacy will not be payable out of the testator's estate, but the legacy duty will be so payable.

Solicitors: *Ball & Redfern*; *Slaughter & May.*

E. K. C.

FARWELL J.

1932
Oct. 27.

In re GRINLINTON.

PUBLIC TRUSTEE *v.* GRINLINTON.

[1932. G. 816.]

Revenue—Settlement Estate Duty—Allowance for Settlement Estate Duty already Paid—Interest thereon—To whom Payable—Finance Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 10), *s.* 14 (*b*).

On the death of an annuitant, to whom an annuity free of duty was given by a will, payable out of the income of the residuary estate, the interest receivable under s. 14 (*b*) of the Finance Act, 1914 (1), for the period between August 15, 1914, and the death of the annuitant on the amount of settlement estate duty paid in respect of the slice of the estate representing the annuity will belong to the persons entitled to the residue, their estate being the one that has suffered by the payment of interest.

In re Booth [1916] 1 Ch. 349 and *In re Duke of Sutherland* [1922] 2 Ch. 782 distinguished.

ADJOURNED SUMMONS.

The testator, by his will dated October 17, 1910, appointed the plaintiff to be his general executor and trustee. After bequeathing a large number of legacies, the testator, by clause 16 of his will, gave all his real and personal estate upon trust that his trustee should sell, call in and convert into money his real and personal estate, and out of the money to arise therefrom to pay his funeral and testamentary expenses and debts and the legacies bequeathed thereby, and make provision for the duty on the legacies and annuities bequeathed free of duty. Then he directed his trustee out of the income of the residue to pay certain annual sums to his children, including his son Edward, amounting in all to 1000*l.* a year. By clause 23 the testator directed his trustee to pay out of the income of the residuary trust funds to his son Edward, during his life, the annual sum of 200*l.*, and after his death to pay such annual sum of 200*l.* to "the present wife of my said son," the defendant Amelia Grinlinton. By clause 26 the testator directed that all the legacies and annuities bequeathed by his will were to be paid free of duty. The testator died on May 12, 1912. Settlement estate duty was paid on the death of the testator on so much of his residuary estate as was requisite to provide the annuities amounting to 1000*l.* a year. Edward Grinlinton died on June 28, 1930, leaving Amelia Grinlinton him surviving. On his death an allowance was claimed under s. 14 (*b*) (1) of the Finance Act, 1914, and one-fifth of the settlement estate duty paid on the death of the testator (being the fraction Edward Grinlinton's annuity bore to the total of the annuities) was set off against the estate duty payable on the death of Edward Grinlinton. Under s. 14 (*b*) (1) a sum equal to simple interest on the amount of the settlement estate duty, calculated at the rate of 3 per cent. per annum from August 15, 1914, up to the death of Edward Grinlinton, also became payable to "the several persons or their representatives who would have been entitled to the income arising from that amount, if that amount had on August 15, 1914, been added to the capital of the settled property," and was divisible amongst those persons or their representatives according to the several interests they would have had in that income. The amount of the interest involved was 58*l.* 1*s.* 2*d.* The question now before the Court was whether the person entitled to that amount, in accordance with s. 14 (*b*) (1) of the Finance Act, 1914, was the defendant Amelia Grinlinton, as personal representative of Edward Grinlinton, or the next of kin of the testator.

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(1) Finance Act, 1914, s. 14 (*b*): "on the first occasion on which estate duty becomes payable in respect of any property which would not have been payable but for this section, the amount of settlement estate duty, if any, which has been paid in respect of that property, shall be allowed against the amount of estate duty payable on that occasion, and if it exceeds that amount, the excess shall be repaid to the estate, and in addition, a sum equal to simple interest on the said amount of settlement estate duty calculated at the rate of three per cent. per annum from the fifteenth day of August, nineteen hundred and fourteen, up to the date of the occasion shall be paid to the several persons or their representatives who would have been entitled to the income arising from that amount, if that amount had on the fifteenth day of August, nineteen hundred and fourteen, been added to the capital of the settled property and shall be divided amongst those persons or their representatives according to the several interests they would have had in that income."

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(1) See note (1) ante, p. 344.

Henry Johnston for the plaintiff.

E. G. Eardley-Wilmot for Amelia Grinlinton. Mrs. Grinlinton is the representative of the person entitled to the income of the annuity and is therefore clearly entitled to the 58*l.* 1*s.* 2*d.*: see Finance Act, 1914, s. 14 (*b*). Even if this could be disputed, the case is entirely covered by *In re Booth* (1) and *In re Duke of Sutherland.* (2)

H. M. Broughton for persons entitled to the residue. Even if the settlement estate duty were tacked to the slice representing the 200*l.* annuity the annuitant would not take any of it, as he was only entitled to 200*l.* a year. The people who would take are the people entitled to the residue. *In re Booth* (1) and *In re Duke of Sutherland* (2) do not apply to this case.

FARWELL J. The first question I have to determine on this summons is a question which arises partly on the true construction of the will of the testator and partly under s. 14 (*b*) of the Finance Act, 1914.

On the death of the testator settlement estate duty became payable on so much of his residuary estate as was required to provide the annuities which amounted to 1000*l.* per annum. That settlement estate duty was paid, but, as appears from the will, the legacies and the annuities were given free of duty, and accordingly, although the settlement estate duty had to be paid, the annuitants were entitled to, and did in fact, receive their annuities without any deduction in respect of duty. On the death of the son Edward, under and by virtue of s. 14 (*b*) of the Finance Act, 1914, certain sums became repayable to the estate for both principal and interest in respect of the settlement estate duty already paid on his annuity. That section of the Act provides as follows: [His Lordship read s. 14 (*b*) and continued:] Now the question that has arisen is with regard to the amount under that section payable in respect of interest. The son's widow, who is his sole executor and beneficiary, claims to be entitled to that amount. On the other hand, the persons

(1) [1916] 1 Ch. 349.

(2) [1922] 2 Ch. 782.

who take as next of kin claim that amount is payable to them. The question must depend on the true construction of the section, and I cannot have any doubt as to what the section means. The section is intended to and does provide that where a sum equal to simple interest is paid, that sum is to go to the persons who would have received it if there had never been anything paid for settlement estate duty, so that, in a case where annuities are given free of duty out of the income of the residuary estate and those annuities have been paid in full, the persons entitled to the sum repaid in respect of interest are the persons entitled to the residuary estate, because their income has been reduced by the loss of the interest on the sum paid for the settlement estate duty.

It is said, however, that this question has already been determined, in a contrary sense, by two other judges, and that that being so it would not be right for me to come to some different conclusion. I may say at once if I were satisfied that those authorities decided the point which I have to consider, I should follow them without expressing any opinion of my own at all, but in my judgment both those cases are distinguishable from the present case.

The first of the cases is *In re Booth.* (1) The facts in that case are a little complicated, but the material part of the case for my purpose relates to an annuity of 150*l.* given to a lady for her life, and Younger J. held that the interest which was repayable on the annuitant's death in respect of the slice of the estate that represented the annuity went to her executor, but in my judgment the true explanation of that decision is that the annuitant had submitted to a deduction from her annuity of an annual sum of 3*l.* a year, being the equivalent to 4 per cent. on the amount of the duty, so that she, by reason of the payment of the duty and by reason of her submission to this deduction, had in fact received less than the full amount of her annuity; she, therefore, was the person who would have become entitled to the income arising from the whole amount if there had

(1) [1916] 1 Ch. 349.

been no deduction. I think that is the true ratio decidendi of the case before Younger J. so far as this part of it is concerned, and it has no application to the present case where, as I have said, the persons who lost income by the payment of the settlement estate duty were not the annuitant but the persons entitled to the residuary estate.

The other case relied upon is a decision of Sargant J. in *In re Duke of Sutherland.* (1) There the facts seem to me to be very different. In that case there was a sum of 150,000*l.* set aside, to the income of which a certain person was entitled for life with remainder to someone else for life with remainder over. The settlement estate duty was payable and paid out of the 150,000*l.*, with the result that both the capital and income of the fund were reduced by such payment, and the tenant for life instead of receiving the whole income of 150,000*l.* only received the income of that sum less the amount of the settlement estate duty. When the repayments were made the person who had received less income than he would otherwise have received, owing to payment of settlement estate duty—i.e., the tenant for life—was entitled to have the amount repaid for interest paid to him. That seems to me to be a totally different case to the one I have to consider, where there is an annuity payable to an annuitant free of tax, so that no deduction from the annuity was made for settlement estate duty, because in this case the persons whose income was reduced by payment of the settlement estate duty were the persons entitled to the residuary estate and not the annuitant, and consequently the persons to benefit by the recoupment of interest are the persons entitled to the residuary estate, and I so decide.

Solicitors: *Theodore Goddard & Co.; Birkbeck, Julius, Edwards & Co.; Meynell & Pemberton.*

P. J. B.

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(1) [1922] 2 Ch. 782.

In re GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION, LIMITED.

FARWELL J.

1932
Nov. 23, 25, 29.

[1932. G. 2376.]

Insurance—Motor Vehicles—Deposit in Court by Insurance Company of Securities to the Value of 15,000*l.—Appreciation in Value of Securities—Company cannot claim to have paid out to it Securities in Excess of* 15,000*l.* —*Assurance Companies Act*, 1909 (9 *Edw.* 7, *c.* 49), *s.* 2, *sub-ss.* 1, 2, 4, 6 —*Road Traffic Act*, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 42, *sub-s.* 2 (*a*) (*b*).

Where an insurance company, carrying on motor vehicles insurance business has, in pursuance of s. 2, sub-s. 4, of the Assurance Companies Act, 1909, as amended by s. 42, sub-s. 2 (*b*), of the Road Traffic Act, 1930, deposited in Court securities to the value of 15,000*l.* and the securities have appreciated in value, the company cannot claim to have securities in excess of 15,000*l.* paid out to it.

ADJOURNED SUMMONS.

In November, 1930, the Corporation lodged in Court 25,865*l.* 2½ per cent. Consolidated Stock, which was then valued at 15,000*l.*, in pursuance of the provisions of s. 2 of Assurance Companies Act, 1909, as amended by s. 42, sub-s. 2 (*b*), of the Road Traffic Act, 1930. Sect. 2, sub-s. 1, of the Act of 1909 provided that: "Every assurance company shall deposit and keep deposited with the Paymaster-General for and on behalf of the Supreme Court the sum of twenty thousand pounds." Sub-s. 2 provided that: "The sum so deposited shall be invested by the Paymaster-General in such of the securities usually accepted by the Court for the investment of funds placed under its administration as the company may select, and the interest accruing due on any such securities shall be paid to the company." Sub-s. 4 provided that: "Where a company carries on, or intends to carry on, assurance business of more than one class, a separate sum of twenty thousand pounds shall be deposited and kept deposited under this section as respects each class of business, and the deposit made in respect of any class of business in respect of which a separate assurance fund is required to be kept shall be deemed to form part of that fund. . . . ." Sect. 42, sub-s. 2, of the Act of 1930 provided that: "Where an assurance company within the meaning of the Assurance Companies Act, 1909, carries on motor vehicle insurance business, that Act shall apply with respect to that business in the same way as it applies to accident insurance business subject to the following modifications: (*a*) If the company does not also carry on assurance business of some other class, the reference in subsection (1.) of section two of that Act to the sum of twenty thousand pounds shall be construed as a reference to the sum of fifteen thousand pounds; (*b*) If the company also carries on assurance business of some other class, the reference in subsection (4.) of the said section two to a sum of twenty thousand pounds shall, as respects the motor vehicle insurance business, be construed as a reference to a sum of fifteen thousand pounds, and, notwithstanding anything in the said Act relieving a company from making a deposit in respect of any class of insurance business where it has made a deposit in respect of any other class of assurance business, the total sum to be deposited under the said subsection (4.) shall in no case be less than thirty-five thousand pounds."

About the middle of 1932, the Corporation decided to change over their holdings of certain classes of British Government securities, including 2½ per cent. Consolidated Stock, to 3½ per cent. Conversion Loan. In the meantime the value of the 2½ per cent. Consolidated Stock had risen very considerably. In pursuance of their policy the Corporation issued the present summons by which they asked that the 25,865*l.* 2½ per cent. Consolidated Stock should be paid out to them, and that they should be allowed to deposit 15,000*l.* 3½ per cent. Conversion Loan in lieu thereof.

At the opening of the summons in Court, leave was asked for and obtained that the summons should be amended in such a way that the sum which was being paid in should be equivalent to or rather more than the sum that was to be paid out. It was, however, agreed, the matter being of great importance to insurance companies and the Board of Trade, that the summons should be dealt with as unamended.

Evershed for the application.

Stafford Crossman for the Board of Trade.

Farwell J. This is a summons which raises matters of considerable general interest to insurance companies.

Taking the summons as unamended, can I or ought I to make an order such as is asked for? Investments to the value of 15,000*l.* were paid into Court under the joint effect of the Assurance Companies Act, 1909, and the Road Traffic Act of 1930. By those Acts it is required of an insurance company carrying on motor vehicle insurance business that a deposit of a sum of 15,000*l.* shall be made. The material section of the Road Traffic Act is s. 42.

The first question is: if stock to the value of 15,000*l.* is deposited in Court, is there any right in the insurance company to come to the Court and say: "The investments which represent 15,000*l.* have increased in value, and are at this moment of greater value than 15,000*l.*, and I want therefore to have paid out to me the excess over 15,000*l.*"; or, to put it in another way: "I want to have transferred out to me the stock which is now standing in Court on the terms that I lodge in Court other stock which will represent 15,000*l.* at present prices," if that in effect involves payment out to the applicant, because the stock to be lodged in Court is of less value than that to be taken out. The first question to be considered is whether an application of that sort can be made at all. Under s. 2 of the Assurance Companies Act, 1909, which, as above appears, is made to apply to the present case, it is provided (substituting the figure of 15,000*l.* for the figure of 20,000*l.*) [His Lordship read sub-ss. 1, 2, 4, and continued:] Then sub-s. 6 of that section provides: "The Board of Trade may make rules with respect to applications for warrants, the payment of deposits, and the investment thereof or dealing therewith, the deposit of stocks or other securities in lieu of money, the payment of the interest or dividends from time to time accruing due on any securities in which deposits are for the time being invested, and the withdrawal and transfer of deposits, and the rules so made shall have effect as if they were enacted in this Act, and shall be laid before Parliament as soon as may be after they are made." Among the Rules which have been made by the Board of Trade, r. 2 of the Rules of 1910 provides that the company which is making the deposit may deposit stock instead of cash under certain circumstances; and in this case that rule was taken advantage of. Rule 6 provides: "In any case where it may appear to be just and equitable so to do, and in particular in any of the following cases, namely," —then there are certain cases set out—"The Court may on the application of the Company order the deposit fund to be transferred from the general account of the Company to a special ledger credit in respect of a particular class of assurance business, or from one special ledger credit in respect of one particular class of assurance business to another special ledger credit in respect of another particular class of assurance business, or otherwise to be dealt with as may be just and equitable and not in contravention of any provisions of the Act." The first thing to be noticed about s. 2, sub-ss. 1 and 2, of the Act of 1909 is that there is nothing to indicate that the Legislature was contemplating that, once the deposit had been made or investments lodged which represented that deposit, the company would be under any obligation to make a further payment in or further deposit if the securities which represented the 15,000*l.* happened to fall in value so that their actual selling value at any one time was less than 15,000*l.*, nor do I see anything which appears to indicate that the Legislature contemplated —what would be, I think, the corollary to that—that if the investments representing the 15,000*l.* appreciated in value the assurance company should be entitled to say: "Pay me the amount by which the securities now in Court are of a greater value than 15,000*l.*" In my judgment, s. 2 of the Act of 1909 contemplated a payment in or a lodgment in Court of a sum of 15,000*l.*: if the sum was paid into Court as cash then it was the duty of the Paymaster to invest it in funds which the company might select; or, if the company took advantage of the rule of the Board of Trade, the company itself might deposit securities. But having made the deposit, or having paid in the 15,000*l.*, it seems to me the section contemplated that the matter was then at an end, so long, at any rate, as the company was carrying on that class of business. It did not contemplate either a payment out or an additional payment in. I am not prepared to say—having regard to the Rules made by the Board of Trade, which under sub-s. 6 of s. 2 are to have effect as if they were enacted in the Act, and having regard especially to r. 6, by which the Court has power in any case where it is just and equitable to make an order with regard to the funds in Court—that there may not be cases where the Court would think it right to order payment out of a fund in Court or a portion of a fund in Court, by allowing transfer out of Court of a particular security and the lodgment in Court of another security, although the amount lodged be of less value than that taken out. But, in my judgment, the Act did not contemplate that; and I do not think that the Court should make such an order merely for the benefit of the assurance company without some very special reason for doing so. Further, in my judgment, in every case where the application is one which involves payment out, that is to say, one where the sum which is taken out of Court is in value greater than the sum paid in or the securities deposited, the application must be made by petition and cannot be made by a summons. Under the Rules of the Board made in pursuance of the Life Assurance Companies Act, 1870, (33 & 34 Vict. c. 61), all applications to the Court in respect of deposits were necessarily made by petition, and as I understand the Rules and the Acts, that still remains in force, except so far as it has been altered by Order LV., r. 2, sub-r. 8, of the Supreme Court Rules. That Order enables applications under the Rules in force made by the Board of Trade under the Assurance Companies Act to be made by summons where the application is for the investment of moneys or funds lodged in Court as deposits or for the payment of interest, dividends or income on any such moneys or funds; but in my judgment that Order does not authorize an application by summons where the purpose of the application is payment out to the applicant. Where, however, as in this case, now that the summons has been amended, the application is in substance an application for a change of investment, that is to say, where the amount which is being paid in or deposited is of an equal or greater value than that which is being taken out, then, as it seems to me, that is a matter which comes within this Order, because it is a matter which deals with the investment, either originally or by way of variation, of moneys in Court: that is an application which can be made by summons and one which, no doubt, in a proper case, would be acceded to. When, however, it comes to a question of payment out it seems to me first, it should be by petition, and, secondly, that the Court should not make an order unless there is some special reason shown why it should do so: because, as I have already said, in my judgment the Act itself does not contemplate that the fund should be dealt with in any way after it is once paid into Court, although under the Rules there is power, which enables the Court, where it is just and equitable, to make orders dealing with the fund.

That being the position, so far as this application is concerned, if there had been no amendment of the summons, I should have dismissed it, and I should have dismissed it on two grounds: first, that it was by summons and not by petition, and, secondly, on the ground that I did not see and I do not see any special reason why it would be just and equitable to make the order; and, in the absence of some evidence to satisfy me that it was just and equitable, even if it had been by petition, I should not have thought it right to accede to the application. As it is, the summons as amended involves no more than a change of investments, and, in those circumstances, I think I am entitled to make, and I propose to make the order. I may say that Mr. Crossman, on behalf of the Board of Trade, does not

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object to the order as now asked, although he might have objected to the order which was originally sought.

I should say this also, that if an application of this kind is made by petition, it obviously must be served on the Board of Trade; and, in my judgment, any summons of this kind, even if it is a summons which really only involves a change of investment, should be served on the Board of Trade, although the Board of Trade, if they are satisfied that it is merely a change of investment and no more, may not think it necessary to take any steps in the matter or to raise any objection. But the Board of Trade should have an opportunity of considering the matter and of raising such objections to the order being made by the Court as it thinks right. After all, the Board of Trade is the only body which is in a position to protect whoever the persons are who are interested in the sum apart from the assurance company itself.

Solicitors: *Smiles & Co.; Solicitor to the Board of Trade.*

P. J. B.

LUXMOORE J.

1931
Oct. 13.

1932
Oct. 13, 14, 18; Nov. 16.

BLEACHERS' ASSOCIATION, LIMITED, AND BENNETT AND JACKSON, LIMITED *v.* THE RURAL DISTRICT COUNCIL OF CHAPEL-EN-LE-FRITH.

[1931. B. 3157.]

Water—Riparian Owners' Rights in Stream—Spring feeding Stream—Underground Stream—Whether flowing in a Defined and Known Channel—Percolating Water — Strata — Excavations — Knowledge of Channel — Evidence—Meaning of words "Known" and "Defined."

The plaintiffs, who were proprietors of bleaching works situated on a stream, sought an injunction to restrain the defendants, the local authority for the rural district through which the stream flowed, from interfering with the R. Spring so as seriously to diminish the supply of water in the stream. At the first hearing the plaintiffs suggested that certain excavations should be carried out close to the R. Spring's point of issue. These excavations were made. The plaintiffs contended that the R. Spring flowed in a defined underground channel, and that the excavations which had been carried out established this fact which was known with reasonable certainty before the excavations were made. The defendants denied that the R. Spring flowed in a defined underground channel, and contended that even if any such defined underground channel existed, it was not possible to know of its existence unless and until the excavations had in fact been made:—

Held, that the plaintiffs had failed to establish before any excavations were made that any such underground channel existed either before or as the result of the excavations, and also that the excavations had not proved that any defined channel existed in the ground which had remained unexcavated.

Held, also, that the excavations established that the water which emerged as the R. Spring was not flowing in any defined underground channel, but was water percolating through the soil and rock of the district, and that the plaintiffs had therefore failed to establish any right to prevent the interference by the defendants with the flow of underground water into the R. Spring.

The headnote in *Bradford Corporation* v. *Ferrand* [1902] 2 Ch. 655 criticized and corrected.

The meaning of the words "defined" and "known," as used by Eyre Chatterton V.-C. in *Black* v. *Ballymena Township Commissioners* (1886) 17 L. R. Ir. 459, 474, 475 referred to and adopted.

ACTION.

The facts are more fully set out in the considered judgment of the learned judge, but shortly stated are as follows:—

The plaintiff Association was the owner of certain bleaching works at Horwich End, Fernilee, Derbyshire, and which were situate on the south (or left) bank of a stream known as the Randal Carr Brook; the plaintiffs Bennett & Jackson, Ld., were a subsidiary company of the Association and occupied the bleaching works in question as their tenant at will. The Randal Carr Brook was fed by a number of streams, one of which was known as the Mevril Brook, which some hundreds of yards from its source was fed by a spring known as the Rainside Spring.

The plaintiffs, as lower riparian proprietors on the banks of the Randal Carr Brook, claimed to be entitled to an undiminished flow of water for the purposes of their bleaching works from the Rainside Spring; and in their action (inter alia) sought an injunction against the defendant council, who were the local authority for the rural district in which the Rainside Spring was situated, to restrain them from carrying out certain proposed works in connection with the supplementing of the public water supply of the district by sinking a shaft near the Rainside Spring so as to divert and interfere with the waters of that spring and thereby materially diminish the quantity of the water which flowed into the Randal Carr Brook by way of Mevril Brook, either by excavating or interfering with the said spring or the surrounding soil. The contention of the plaintiffs was that the Rainside Spring flowed in a defined underground channel and that certain excavations carried out by the defendant council since the issue of the writ at the suggestion of the plaintiff Association had established the existence of a defined underground channel or channels constituting the Rainside Spring with reasonable certainty. The defendant council denied this, and further contended that even if any such defined underground channel existed it was impossible without actual excavation for any one to have any knowledge of its existence.

A. Grant K.C. and *Harold Christie* for the plaintiffs. The excavations carried out by the defendant council have shown that in the circumstances of this case a defined underground channel exists, and what has been done is really nothing more than to establish with reasonable certainty what was known before the excavations were carried out. If this is so then the plaintiffs are entitled to the remedy they are seeking.

H. B. Vaisey K.C. and *G. D. Johnston* for the defendants. No defined underground channel constitutes the Rainside Spring before its point of issue, and the excavations have failed to disclose this. The water which feeds this particular spring before reaching the point of issue percolates through the surrounding soil and rock and does not run in any defined channel. Therefore the plaintiffs' contention cannot prevail: *M'Nab* v. *Robertson* (1); *Chasemore* v. *Richards* (2); *Ewart* v. *Belfast Poor Law Guardians* (3), which is strongly relied on; *Bradford Corporation* v. *Ferrand* (4) and *English* v. *Metropolitan Water Board.* (5) The question really is what is included in the term "defined."

A. Grant K.C. in reply. These words "known" and "defined" are considered in an Irish case: *Black* v. *Ballymena Township Commissioners* (6); *M'Nab* v. *Robertson.* (7) It is submitted that in this case there is a defined channel, and the water flows in considerable volume.

Cur. adv. vult.

Nov. 16. LUXMOORE J. The Bleachers' Association, Ld., and Bennett & Jackson, Ld., which is a subsidiary company of the Association, claim an injunction to restrain interference by the defendant council with a spring in the Peak district of Derbyshire known as "the Rainside Spring," so as materially to diminish the quantity of water flowing into a stream known as the Randal Carr Brook through a tributary of that stream known as the Mevril Brook. The Association are the owners of bleaching works which are situate on the left bank of the Randal Carr Brook, and the plaintiff company is the tenant at will of the Association of those works. The defendant council is the local authority for the rural district in which the Rainside Spring is situate. Recently the council acquired, for the purpose of supplementing the public water supply of the district, a considerable area of moorland in the neighbourhood of the Rainside Spring, including the actual site where it emerges from the hillside.

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(1) [1897] A. C. 129.

(2) (1859) 7 H. L. C. 349.

(3) (1881) 9 L. R. Ir. 172, 184, 194.

(4) [1902] 2 Ch. 655.

(5) [1907] 1 K. B. 588.

(6) 17 L. R. Ir. 459, 474.

(7) [1897] A. C. 129, 134.

In July, 1931, the defendant council was proposing to sink a shaft in the hillside to the south of the Rainside Spring at a point about 31 feet from the spring's point of issue and to drive adits from that shaft in several directions. One of such adits was to be driven in a south-easterly direction from the proposed shaft to a point behind and within 24 feet of the point of issue. The plaintiffs contended, and still contend, that the waters of the Rainside Spring flow in a defined underground channel, or in a number of such channels, and that this fact was at the date of the issue of the writ known with reasonable certainty. They contend that certain excavations which have been made since the issue of the writ establish the existence of defined underground channels constituting the Rainside Spring. The defendant council contended, and still contend, that there is or are no defined underground channel or channels constituting the Rainside Spring before its point of issue, and that even if any such defined underground channel or channels existed it was impossible for any one to have any knowledge of that existence without actual excavation. It is now contended on behalf of the defendant council that the excavations actually made have failed to prove the existence of any defined underground channel. The contention of the defendant council was, and is, that the water which feeds the Rainside Spring before it reaches the point of issue percolates through the surrounding soil and rock and does not run in any defined underground channel.

A plan of the work proposed to be carried out by the defendant council was sent to the plaintiffs' advisers on July 14, 1931, and as the result the writ in this action was

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issued on the same day. Leave to serve notice of motion with the writ was obtained, and on July 17 the plaintiffs moved for an injunction to restrain the defendant council from proceeding with the proposed work pending the trial of the action. On July 24, 1931, I gave directions for a speedy trial, and on October 13, 1931, the action came on for hearing. After Mr. Grant had opened the case it was suggested that the question whether there was, or were, a defined underground channel or defined underground channels could be ascertained and determined with certainty if an excavation were made at an agreed point. In the result the parties agreed that the defendant council should proceed under observation of the plaintiffs' advisers with the excavation of the proposed shaft and a trench running into it along the line of the proposed adit to which I have already referred. The case accordingly stood over for this work to be done. [His Lordship commented on the dilatoriness displayed by the parties in the completion of the work of excavation and the restoration of the action to the list after the excavation had been carried out :] The excavation work which was agreed upon has been completed and I have had the evidence of the various witnesses with regard to the facts observed during, and as the result of, that work.

The plaintiffs contend that the excavations have established that the water which emerges from the hillside as the Rainside Spring was running into the site of the excavated shaft and trench in defined underground channels and that the excavation has done nothing more than establish what was known with reasonable certainty before the work was done ; that is to say it has established the existence of those defined underground channels which an expert geological survey of the site prognosticated would be found.

The defendant council contends that the excavations have established what was contended on its behalf before the excavations were made—namely, that the water which has been tapped during and by reason of the work is nothing more than percolating water, that it does not run in any defined channel in the proper sense of that phrase, and that if—contrary to its contention—it should be held that the water runs to the Rainside Spring in a defined underground channel or defined underground channels, this fact could not have been known to any one no matter how expert a geologist unless and until the excavations had in fact been made.

In the result it is I think necessary for me to determine first, is the water which runs into the excavations percolating water or does it run in a defined underground channel or defined underground channels? If the first alternative is established there is an end of the case, for it is well settled that there is no legal ground on which the defendant council could be prevented from collecting percolating water, no matter how serious the result may be to the plaintiffs. If on the other hand it is established that the water runs in a defined underground channel or defined underground channels, then it is necessary to consider whether this fact was "known" at the date of the issue of the writ or is now known. In this connection it is necessary to consider the meaning of the word "known."

It was decided by Farwell J. in *Bradford Corporation* v. *Ferrand* (1) that unless the existence and course of a defined underground channel is known with reasonable certainty a lower riparian owner can have no right of action against the owner of the land through which the channel flows for abstraction of the underground water. The headnote contains the following passage: "If underground water flows in a defined channel into a well supplying a stream above ground, but the existence and course of that channel are not known and cannot be ascertained except by excavation, the lower riparian proprietors on the banks of the stream have no right of action for the abstraction of the underground water." It seems to me that this statement is too wide and does not accurately represent the effect of the judgment, because it would appear from the headnote to exempt the landowner through whose land it has been ascertained by excavation that water flows in a defined underground channel from all subsequent liability for abstraction of that water, although the abstraction took place long after the existence of the defined channel had been ascertained as a matter of precise knowledge. In my view the judgment was intended to deal with, and ought to be read as confined solely to, the case where the excavations although disclosing a defined channel do not establish with reasonable certainty the continuation and course of that defined channel through the surrounding land; because it seems to me that where an excavation has disclosed the existence of a defined channel, then at least so far as the excavation extends that channel has become a "known" channel, and any subsequent act of interference with its known flow would inflict an injury on the lower riparian proprietor capable of prevention by appropriate action. That some limitation on the meaning of the word "known" was contemplated by the learned judge is I think clear from the passage in his judgment where, after quoting from the judgment of Fitzgibbon L.J. in the Irish case of *Ewart* v. *Belfast Poor Law Guardians* (1), he refers to the River Mole. The quotation and passage which he cites from the Irish case is as follows: "In my opinion it is impossible to recognise a natural right which would subject the lands of another to the burden of maintaining an unknown flow of water (whatever be the geological character of its channel), without introducing every difficulty which has already prevailed to prevent the recognition of such a right in respect of 'percolating' water, strictly so called. It appears to me impossible to find the test of the existence of . . . . natural rights . . . . in *ex post facto* geological investigations; yet it is by some such means alone that any difference could be discovered between oozing or percolating water and water running through or collecting in underground fissures." The learned judge continues: "There is nothing inconsistent with this view in cases like that of the river Mole, where a river disappears into the ground, and what is apparently the same river reappears on lower ground. In such cases there is a terminus a quo and a terminus ad quem, and the owners of land between the two and their riparian neighbours can fairly be presumed to know of the existence and course of the stream. As Pollock C.B. says in *Dickinson* v. *Grand Junction Canal Co.* (1): 'If the course of a subterranean stream were well known, as is the case with many, which sink underground, pursue for a short space a subterraneous course, and then emerge again, it never could be contended that the owner of the soil under which the stream flowed could not maintain an action for the diversion of it, if it took place under such circumstances as would have enabled him to recover if the stream had been wholly above ground.' That passage was cited with approval by Lord Chelmsford in *Chasemore* v. *Richards*. (2) At any rate cases of that class rest on the knowledge, actual or presumed, of the existence of an underground stream."

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(1) [1902] 2 Ch. 655, 664, 665.

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(1) 9 L. R. Ir. 172, 205.

It is I think clear that the question whether the lower riparian owner had any right to prevent abstraction or interference by acts subsequent to the making of the excavation which established the existence of the defined underground channel was not considered by Farwell J., for the case came before him for argument on the point of law raised by the statement of claim in that action in the following passage in the defence: "Assuming that underground water flows or flowed to the [spring] in a defined channel, but that the existence and course of that defined channel is not and cannot be ascertained or known except by excavation of the soil, the plaintiffs have no right of action for the abstraction of such underground water, and are not entitled to maintain this action." The point of law was I think confined to the case where the existence and course of the defined channel is not known at the date of the issue of the writ and cannot be ascertained except by excavation subsequent to its issue, because once it is established that there is a defined underground channel and that its course can be ascertained with reasonable certainty, the rights of the lower riparian owner are crystallized and any fresh act of

(1) (1852) 7 Ex. 282, 300, 301.

(2) 7 H. L. C. 349, 374.

interference or abstraction which—ex hypothesi must be done with knowledge of those rights—must then be actionable; in other words the liability for abstraction or interference must depend on the knowledge of the actor at the time the act complained of is committed and not on the manner in which that knowledge has been obtained. Of course if the result of the excavation is only to define the course of the channel so far as that channel is uncovered the landowner will be under no liability in respect of acts which in fact interfere with the flow of the water in any part of the underground channel which has not, as the result of such excavation, been ascertained to exist with reasonable certainty. To put a concrete case, if as the result of excavation it is established that a defined channel exists over an ascertained length but there is no reasonable certainty as to the continuation of that channel or of its course through the unexcavated ground, then the lower riparian owner cannot legally object to any act by the landowner which may result in the abstraction of or interference with water from or in the ascertained defined channel if such abstraction or interference results not from direct interference with the ascertained defined channel but from interference with the defined channel as ascertained by excavation subsequent to the interference. I think the headnote of the case before Farwell J. should be amended by reading into it the word "subsequent" immediately before the word "excavation," so that it reads: "If underground water flows in a defined channel into a well supplying a stream above ground, but the existence and course of that channel are not known, and cannot be ascertained except by *subsequent* excavation, the lower riparian proprietors on the banks of the stream have no right of action for the abstraction of the underground water."

I think that the words "defined" and "known," when used in the statement of the rule of law that subterranean water can only be the subject of riparian rights when flowing in defined and known channels, must be construed in the manner in which they were defined by Eyre Chatterton V.-C.

in *Black* v. *Ballymena Township Commissioners.* (1) In that case the learned Vice-Chancellor construed "defined" as meaning a contracted and bounded channel, although the course of the stream may be undefined by human knowledge, and "known" as meaning the knowledge of reasonable inference from existing and observed facts in the natural or pre-existing condition of the surface of the ground. I respectfully refer to and adopt what he says in his judgment. After stating that it is well established that no riparian rights exist in respect of subterranean waters unless they are shown to flow in defined and known channels, he goes on to point out that a difficulty appears to exist as to the application of that rule by reason of the use of the word "known" in connection with the word "defined," and he says: ". . . . it does not seem to have been sufficiently laid down as yet what the nature or extent of the knowledge is which must be proved to exist in order to constitute the riparian relation. It cannot mean that a channel should be visible throughout its course, which would be an impossibility from the very fact of its being subterranean. In considering this question, the knowledge required cannot be reasonably held to be that derived from a discovery in part by excavation exposing the channel: but must be a knowledge, by reasonable inference, from existing and observed facts in the natural, or rather the pre-existing, condition of the surface of the ground. The onus of proof lies, of course, on the plaintiff claiming the right, and it lies upon him to show that without opening the ground by excavation, or having recourse to abstruse speculations of scientific persons, men of ordinary powers and attainments would know, or could with reasonable diligence ascertain, that the stream, when it emerges into light, comes from, and has flowed through, a defined subterranean channel. The instance given in some of the cases of a stream sinking underground when it reaches a certain place, and pursuing for a short space a subterranean course, and then emerging, shows plainly the kind of knowledge required. No one knows as a matter of fact that it flows underground from the one point to the other in a defined channel, or indeed even that it is the same stream; but our reason, grounded on our knowledge of ordinary natural laws, and on the impossibility or great improbability of the phenomena being otherwise accounted for, leads to an inference of fact, amounting practically to knowledge, that it is the same stream, and that it has flowed underground in a defined channel. The question of fact to be determined in such cases is whether the water appearing at a given point, and then becoming a surface stream, comes from subterraneous percolation or oozing, or flows in a defined channel or watercourse underground to the point where it so appears; and for the decision of that question it lies on the party asserting his right to the flow to show affirmatively, not as a matter of fact, but as a reasonable inference from known facts, that the water comes to the place of emergence, not by percolation or oozing, but in a defined channel. Beyond this I do not think proof of knowledge can be required without destroying the claim of right to the flow of underground streams altogether."

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(1) 17 L. R. Ir. 459, 474.

Let me now apply what I have stated to be my appreciation of the law to the facts of this case so far as the Rainside Spring is concerned. The plaintiffs called no expert witness, but I have had the benefit of the evidence of an experienced geologist, Mr. Morton, called on behalf of the defendant council. He has made a study of the conditions under which subterranean water exists in the Pennine Range and has made many surveys in the Chapel-en-le-Frith district, and particularly of Combs Moss, from which I think all the streams mentioned—including the Rainside Spring—emerge. Geologically Combs Moss is occupied beneath the peaty top soil by a bed of sandstone locally called "Third grits." This sandstone is pervious to water. The bed is of an average thickness of 150 feet. Immediately below this bed of sandstone is a thick bed of shale. The shale is impervious to water and therefore it is unnecessary to consider for the purposes of this case the lower strata. Combs Moss slopes from a southerly direction towards the north and the shale bed tilts in the same direction. Mr. Morton graphically described the impervious shale bed as forming a saucer holding the porous sandstone bed which tilted in the same direction as the slope of the hillside. The top of the shale bed on the one side is between 1550 and 1600 feet above ordnance datum, and on the other side the level varies from between 1300 and 1250 feet. The sandstone or grit which lies in this shale saucer is intersected by systems of joints. These joints run vertically and horizontally, the vertical joints are called fissures and the horizontal joints are called bedding planes. It is usual to find the systems of fissures running in more or less parallel directions intersected at right angles by other parallel systems of fissures. The shale saucer being impervious holds up the rainwater which has fallen on the surface of the moor and has penetrated through the sandstone itself and the fissures and bedding planes contained in it, with the result that at its lower levels the sandstone is saturated. The level of saturation in the sandstone is known as the water table. The whole of the water in the saturated area must gradually move in the direction of the tilt of the shale bed, that is towards the side of Combs Moss on which the Rainside Spring is situated. This appears quite clearly from a study of the geological plan which has been produced. The excavations made on behalf of the defendant council were begun about November 24, 1931; a shaft some 8 feet square was sunk with a trench 5 feet wide running from the shaft in a south-easterly direction. The excavations were made in the hillside and were dug in a slope in conformity with the vertical slope of the hill. The excavations disclosed successive layers of broken stone and marl until the stratified sandstone rock was reached at a depth of about 12 feet. No water was observed until a depth of between 19 and 20 feet was reached, although the sound of running water appears to have been heard before it was actually reached in the excavation. When the excavation was between 19 and 20 feet deep, water was discharged into the shaft in considerable quantities from two fissures found to exist in the rock. The excavation disclosed that the sandstone which had been uncovered possessed the same features as were displayed in the sandstone already exposed in the district—namely, the existence of systems of intersecting fissures and bedding planes. The fissures from which the water was seen to flow into the shaft were the largest fissures disclosed, but water could be seen to be exuding from the smaller fissures and cracks and from the sandstone itself. Mr. Morton said that almost every crack and fissure in the excavations showed this, and it was on this account, as well as from his examination of the sandstone, that he based his conclusions that at the depth of about 19 to 20 feet in the shaft the top of the water table in the district had in fact been reached. Mr. Morton suggested that if the trench and shaft were excavated to a lower depth this fact would clearly be established. He pointed out that the top of the water table must necessarily vary in wet and dry seasons, and that his observations in the excavations made satisfied him that the highest point to which the water table had risen during the period of excavation was at the time when the water flowed out of the two main fissures at the points I have already mentioned at a depth of between 19 and 20 feet in the shaft. Mr. Morton stated that the lowest level to which the water table fell during the period of his observations was the level at which the water stood at the time of his last visit a few days before the trial of the action.

I am satisfied by the evidence of Mr. Morton that although the water was found to flow into the excavations in considerable quantities from these two main fissures and also from one other fissure disclosed in the trench, yet the presence of the water in those fissures at the depth reached was in no way exceptional but was in fact the condition found in the narrower fissures and cracks which were also disclosed in the shaft and trench; and I am further satisfied that this condition is what geologists expect to find throughout the district. It is true that when the fissures were reached and cut, water was found to flow out of them into the lower parts of the excavations in considerable volume, because the excavations had been carried below the top of the water table at those points. The excavations established that fissures of varying width existed, but there was nothing to prove that the particular fissures exposed or any one of them continued from the point of exposure to the point where the Rainside Spring emerges from the hillside in the sense that these fissures or any of them could properly be described as constituting defined channels or a defined channel. I have come to the conclusion that the water disclosed in the excavations is the water percolating through the soil and rock of the district including the fissures, cracks, and bedding planes existing in the rock; and that the water issuing from the three fissures to which I have referred does not run in a defined channel. I do not think that anything in the evidence of the plaintiffs' witness Mr. Lomax as to his observations and experiments is in any sense at variance with this conclusion. Indeed I think that Mr. Morton accepted those observations and experiments as being entirely consistent with the conclusions he drew as an expert geologist from his own observations.

In my judgment the plaintiffs have failed to establish that the water, which emerges as the Rainside Spring, flows in any defined underground channel or channels, and consequently they have failed to establish any right to prevent the interference by the defendant council with the flow of underground water into the Rainside Spring. If however I am wrong in my conclusion and I ought to hold (contrary to the view expressed by me) that the underground water runs in a defined underground channel, I am satisfied by the evidence that before any excavation was made it was quite impossible to establish that such defined underground channel existed or that its course was known or ascertained. Further I am satisfied that notwithstanding the excavation it is at the present time impossible to prove that any defined channel exists in the ground which remains unexcavated, or a fortiori to point out the course of any such channel beneath the unexcavated ground. In other words, I hold that the plaintiffs are unable to prove that the underground water,

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even if it flows in a defined channel, flows in a "known" defined channel. On either view of the case I hold that the plaintiffs have failed to establish any legal right to the uninterrupted flow of any underground water. Consequently I hold that the action fails and I dismiss it with costs.

Solicitors: *Patersons, Snow & Co., for Wilson, Wright, Earle & Co., Manchester; Moodie, Sons & Brown, for Bennett, Bunting & Co., Chapel-en-le-Frith, Derbyshire.*

A. R. T.

FARWELL J.
1932
Nov. 11, 23.

In re JOHN.

JONES *v.* JOHN.

[1932. J. 710.]

Administration—Personal Estate insufficient to meet Legacies and Debts—Value of Property—Mortgage, created by Testator, charged on Property to be Deducted—Legacies charged on Property not to be Deducted—Administration of Estates Act, 1925 (15 *Geo.* 5, *c.* 23), *Sch. I., Pt. II., para.* 6.

The "value" of property for the purposes of para. 6 of Part II. of Sch. I. to the Administration of Estates Act, 1925 (1), is the value of the property to the testator. Where there is a devise of property, subject to a mortgage created by the testator, the amount of the mortgage must be deducted from the value of the property for the purposes of para. 6. Where there is a devise of property, subject to the payment of legacies, the legacies are not to be deducted.

ADJOURNED SUMMONS.

The testator by his will, dated August 1, 1930, appointed the plaintiff and the defendants, Jenkin Thomas John and Aerol Ogwy Jones, to be his executors and trustees. After providing for certain pecuniary legacies, the testator devised and bequeathed all his residuary real and personal estate to his trustees upon various trusts, and he devised a certain property, subject to a mortgage created by the testator, to the defendant David John, and another property, subject to certain legacies named in the will, to the defendant Jenkin Thomas John. The testator died on March 17, 1931.

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(1) First Schedule, Part II.:—
"Order of application of assets where the estate is solvent. . . .
(6) Property specifically devised or bequeathed, rateably according to value."

The personal estate of the testator having proved to be insufficient to meet the pecuniary legacies, debts and expenses, a question arose on the summons whether the mortgage and legacies should be deducted from the value of those devises for the purpose of finding what proportion of the legacies, debts and expenses should be borne by them.

C. E. Harman for the plaintiff.

R. Gwyn Rees for the two devisees. Under para. 6 of Part II. of Sch. I. to the Administration of Estates Act, 1925, and in the circumstances of the present case, the property specifically devised and bequeathed has to bear rateably according to value the debts and expenses not covered by the assets specified in paras. 1 to 5. By s. 55, sub-s. 1 (xvii.), "property" includes any interest in real or personal property. Para. 6 ought to be construed as equivalent to "property, including any interest in property, specifically devised or bequeathed, rateably according to the value of the property or the interest, as the case may be." The devises here are charged with : (1.) a mortgage debt created by the testator ; (2.) certain legacies charged thereon by the will. The benefit taken by the devisees is not the property itself, but the property subject to the charges. They therefore took merely an interest in property, and ought only to be called upon to bear debts and expenses according to the value of that interest.

W. T. Elverston for a devisee of land not charged with mortgages or legacies. Para. 6 refers to the property and not to the interest of the devisee therein under the will : see s. 35, sub-s. 1, where there is an express reference to an interest in property as distinguished from property. Neither the mortgage nor the legacies are to be deducted from the two devises in arriving at their value for the purposes of para. 6.

Stafford Crossman for the Attorney-General.

P. J. Sykes and *Leonard Stone* for other parties.

FARWELL J. The question I have now to determine arises upon the First Schedule to the Administration of

Estates Act, 1925, Part II., para. 6. The testator has specifically devised certain properties to certain persons, and the question is how as between them the legacies and expenses are to be borne. Part II. provides the various ways in which the property is to be applied for that purpose, and para. 6 says property which is specifically devised or bequeathed is to be applied rateably according to value. The testator had certain property which he devised subject to a mortgage created in his lifetime. It is said with regard to the property so devised that the word "value" in para. 6 means the value of the property as unincumbered property and not the value of the property in the hands of the testator. The testator had, in fact, in respect of these particular properties, only an equity of redemption, and that is the value which, in my judgment, must be taken for this purpose. The "value" cannot mean the actual price which the property would fetch in the open market free from incumbrance: it must mean the value to the testator, and since all he had was the equity of redemption, that is the value which must be taken.

Also, it seems to me that it is quite impossible to read the word "value" in para. 6 as meaning the interest the beneficiary takes. It must mean the value of the property to the testator. Where the testator imposes on a legatee an obligation to make certain payments thereout as legacies, I cannot read "value" as meaning what the beneficiary is ultimately going to receive from the property. There will, therefore, be a declaration that there be deducted from the probate values the amount of the mortgage on the properties so charged, and that there be no deduction from the value of the properties devised to the defendant, J. T. John, in respect of the several legacies which under the will he is bound to pay.

Solicitors: *E. C. Rawlings, Butt & Bowyer, for Randall & Co., Bridgend; Jacques & Co., for W. M. Thomas, Bridgend; Helder, Roberts, Giles & Co., for B. Edward Howe, Port Talbot; The Treasury Solicitor.*

P. J. B.

BROKEN HILL PROPRIETARY COMPANY, LIMITED v. LATHAM AND OTHERS.

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MAUGHAM J.
June 30; July 1, 21.
C. A.
Oct. 27, 31; Nov. 1; Dec. 19

[1932. B. 1437.]

Company—Debentures—Australian Company—Debentures issued in Australia—Registered Offices in Australia and London—Moneys secured Payable in Australia or London at Holder's Option—Register of Debenture Holders established in London—Transfer of some Debentures to Register in London—Option to be paid in London exercised—"Australian Pound"—Payment in London whether in Sterling or Australian Currency.

In October, 1920, an Australian company incorporated in Victoria, and having also a registered office in London, England, issued mortgage debentures secured by a trust deed. By each of the debentures the company covenanted to pay the principal moneys on October 1, 1940, or such earlier date as they should become payable in accordance with the conditions indorsed thereon, and in the meantime to pay interest thereon at 7 per cent. per annum in accordance with the coupons annexed thereto. Under the conditions both principal and interest were payable in either Australia or London, at the holder's option. In accordance with a supplemental trust deed dated September 1, 1921, an additional register of debentures was established in London, and the company had power to make provision for (inter alia) transfer of registration from one register to the other. At the date of the last drawing of debentures for redemption before this summons—namely, October 7, 1931, over 6000 debentures were outstanding, of which 137 were on the London register:—

Held, by Maugham J., that the payment to debenture holders electing to be paid in London must, both as to principal and as to interest, be in sterling, without deduction on account of the exchange value of the pound in Australia.

On appeal:—

Held, by the Court of Appeal (Lord Hanworth M.R. dissenting), that on the true construction of the debentures and of the annexed coupons there was no implied stipulation that, in the event of a debenture holder exercising his option to be paid in London, the company could be required to pay the principal moneys and interest thereby secured in sterling and not in Australian currency.

Held, therefore, that the appeal must be allowed, and in lieu of the declaration made by Maugham J. there must be a declaration that the sums payable by the company in London in redemption of, and for interest on, the debentures in question ought in all cases to be paid in Australian currency converted into sterling at the rate of exchange current in London on the due date for payment thereof.

ORIGINATING SUMMONS.

This was a summons to determine whether an Australian company, which had a registered office also in London and

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had issued in Australia mortgage debentures redeemable in Australia or London at the option of the registered holders, was bound to pay registered holders electing to be paid in London in sterling, without any allowance for conversion from Australian currency.

The following statement of the facts is taken from the considered judgment of Maugham J.:—

The plaintiff company was incorporated on August 13, 1885, in the State of Victoria in the Commonwealth of Australia under the Companies Statute, 1864, of the State of Victoria. The nominal capital of the company is 3,000,000*l.* divided into 3,000,000 shares of 1*l.* each. The company's registered office in Australia is at Melbourne, Victoria, and it also has a registered office in England at No. 3 Great Winchester Street, in the City of London.

In October, 1920, the company, acting within its powers, made an issue of 15,000 "B" or second mortgage debentures of 100*l.* each, ranking subject to certain "A" debentures of the company, and secured by a trust deed dated October 29, 1920, made between the company of the one part and certain trustees resident in Australia of the other part. The trustees were in fact the inspectors for the time being of the Commonwealth Bank of Australia in Sydney and Melbourne respectively.

By each of the debentures the company covenanted that it would on October 1, 1940, or on such earlier day as the principal moneys thereby secured should become payable in accordance with the conditions indorsed thereon, pay to the registered holder thereof the sum of 100*l.*, and would in the meantime pay interest thereon at the rate of 7*l.* per cent. per annum by half-yearly payments on the first days of the months of April and October in each year, the first of such payments to be made on April 1 then next, and to be paid in accordance with the coupons annexed thereto. The debentures contain a floating charge, subject to the securities created by the company and then subsisting in respect of the "A" debentures for the time being outstanding. Each of the debentures was expressed to be issued subject to and with the benefit of the conditions indorsed thereon, which were to be deemed part of it.

The following conditions may have some importance for the present purpose. Condition 2 provided for a register of debentures to be kept at the company's registered office at Melbourne and for inspection of the register by the registered holder of the debenture. Condition 4 provided for transfers and stated that any transfer must be delivered at the registered office of the company together with a fee and certain evidence of identity of title. Condition 10 provided as follows: "The company will appropriate and set apart in each year for 20 years the sum of 75,000*l.*, the first of such sums to be set apart on the 1st day of October, 1921, as a cumulative sinking fund to provide for the service of the debentures of this series, and the company shall have the option of supplementing such fund in any year or years prior to 30th September, 1927, up to the amount of 50,000*l.* per annum. Such fund shall be from time to time applied in the redemption or discharge of so many of the debentures of this series as the fund shall suffice to redeem in manner hereinafter mentioned: (*a*) The company may at any time up to and inclusive of the 30th day of September, 1927, out of the said service fund purchase at a price which exclusive of accrued interest shall not be above par any of the debentures of this series. (*b*) After the said 30th September, 1927, the particular debentures to be from time to time redeemed shall be determined by annual drawings which the company shall cause to be made in the presence of a notary public at its registered office in Melbourne within fourteen days after each 30th September. (*c*) Forthwith after each drawing the registered holders of the debentures drawn for redemption shall respectively be notified that the same have been so drawn and the principal moneys secured by the debentures so drawn shall become payable and be paid off at par on the 31st day of March next after the same shall have been so drawn together with interest up to the date so fixed for payment but no interest shall accrue or be payable after such date on any debenture so drawn as aforesaid."

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Condition 12 was as follows: "The moneys hereby secured will be paid as to principal at any office of the Commonwealth Bank of Australia in Sydney, Melbourne, Adelaide or London at the registered holder's option and as to interest either at any of such offices or at the said Bank's offices at Perth, Brisbane or Hobart." Condition 13 provided in the usual way that the registered holders of the debentures would be entitled to the benefit of the provisions contained in the trust deed of October 29, 1920.

Each of the coupons provided that the half-year's interest due at the successive dates at which interest would be payable was payable at any office of the Commonwealth Bank of Australia in Sydney, Melbourne, Brisbane, Adelaide, Perth, Hobart or London at the cost of the holder as to any further stamp or other duty, if any.

The trust deed of October 29, 1920, provided in clause 3 for the establishment of a sinking fund for the redemption of the debentures and for the opening of an account with the Commonwealth Bank of Australia to be kept in the joint names of the trustees and the company. Other provisions in relation to the sinking fund were similar to clause 10 of the conditions on the debentures, which I have already stated and which it is, therefore, unnecessary to repeat; and I do not think that there is any other clause in the trust deed which is material for the present purpose.

By a supplemental trust deed dated September 19, 1921, and made between the company and the trustees in pursuance of a power contained in the original trust deed of making modifications therein which in the opinion of the trustees it should be expedient to make with a view of obtaining a quotation on any stock exchange in Australia or in England, clause 2 of the trust deed was modified by the addition of provisions for the establishment of a register of the debentures at the registered office of the company in London in addition to the said register at Melbourne, and empowering the plaintiff company to make such further provisions or regulations as from time to time it might think fit in regard to the keeping of the Melbourne register or the

London register respectively, including provisions for the transfer of registration from one to the other of such registers.

On March 30, 1932, the date of the issue of this summons, one pound in Australian currency was worth, according to the rate of exchange in London, about sixteen shillings in English currency. By this summons the company asked (inter alia) whether sums payable by it in London in redemption of and/or for interest on debentures with regard to which the registered holders had exercised the option to be paid in London ought to be paid in sterling without any allowance for conversion from Australian currency.

W. P. Spens K.C. and *D. Ll. Jenkins* for the company. In 1920, the currencies of Australia and England, although they had common units of measurement, were not in law the same, and are not in law the same now. They are and have always been quite different currencies. At the present time there is a difference in exchange of 25 per cent. against Australia, so that to pay 100*l.* in London in English currency costs the company over 125*l.* If the true view is that the company is bound to pay the interest and the redemption money in sterling where the option to be paid in London is exercised, without any allowance being made for the difference in exchange, the whole of the company's sinking fund arrangements will be upset. On the footing that Australian currency was in 1920 and is now essentially different from English currency, the contract between the company and the debenture holders was to lend in Australian currency, and the company's obligation is to repay in that currency. A debenture holder suing in London for the sum due is entitled to an order for payment in London on the due date of the equivalent in sterling of 100*l.* of Australian currency. The contract cannot be regarded as a sterling contract.

The establishment and regulation of English currency was originally a matter of the King's prerogative. At quite an early date Parliament took on itself the right of interfering, and the prerogative was narrowed down to the extent to which the Crown assented to that interference. The modern currency of to-day really dates, so far as the coinage is concerned, from the Currency Act, 1816, which made gold coinage the basis of English currency and established the silver token coinage which, with minor alterations, is the same at the present day. The first of the Acts which regulate the coinage of the present day is the Coinage Act, 1870. In 1920 English currency consisted of the gold, silver and bronze coinage under the Currency Acts, Bank of England notes, and the Treasury notes then in existence. Also, the gold coins minted in Australia were legal tender in the United Kingdom under certain Acts. Between 1920 and 1932 were passed the Gold Standard Act, 1925, the Currency and Bank Notes Act, 1928, by which arrangements were made for the withdrawal of Treasury notes and authority was given to the Bank of England to issue the pound and ten shilling notes which replaced Treasury notes and are now in existence, and, finally, the Gold Standard (Amendment) Act, 1931, which relieved the Bank of England from selling gold to persons who gave legal tender. There is no reason to believe that gold coins minted in Australia are not still part of the currency of and legal tender in the United Kingdom; but the real currency of the United Kingdom is the paper bank notes and nothing else, because gold cannot be obtained for them from the Bank of England. Thus the effective currency of the United Kingdom at the present moment consists of the paper bank notes and the silver and bronze coinage.

In 1852 came a Royal Proclamation attempting to make the coinage currency of the United Kingdom the currency of Australia. That was just at the time of the gold discoveries in Australia. By an Order in Council dated August 19, 1853, the first Colonial mint was established in Sydney, and an Order in Council dated October 18, 1854, made the gold coins coined at that mint current in Australia. By a Royal Proclamation of 1866 they were made legal currency in the United Kingdom. In that year, also, by a

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general Colonial Branch Mint Act, the Crown was authorized to establish mints in the Colonies and to make the coins struck at the Colonial mints current throughout Her Majesty's Dominions. By 1869 British currency had been made, by proclamation, current in Victoria. An Order in Council of 1896 made the Coinage Act, 1870, subject to modifications, applicable to all the Australian colonies. By another of 1897 and two others of 1900 it was ordered that the coins struck at all the branch mints in Australia were to be current throughout Her Majesty's Dominions as if they had been issued in England. Thus, before the passing of the Commonwealth of Australia Constitution Act, 1900, the currency of Australia consisted of the gold coinage of the United Kingdom and Australia, the silver and bronze coinage of the United Kingdom, and the local note issues of Australia. [They referred to Part V., s. 51 (xii.), of the Commonwealth of Australia Constitution Act, 1900. (1)] By an Order in Council of January 23, 1911 (No. 92 of 1911), the Coinage Acts of the United Kingdom were made no longer to have any application to Australia. The Coinage Act, 1909 (No. 6 of 1909, Commonwealth), relates to currency, coinage, and legal tender. [They referred to the Australian Notes Act, 1910–1911 (No. 11 of 1910 and No. 21 of 1911, Commonwealth), s. 4, sub-s. 1; s. 5; s. 6, sub-s. 1; s. 9, sub-s. 1. (2)] Under the Australian Notes Act, 1910–1911, the original Treasury notes were issued. The

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(1) Sect. 51: "The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:— . . . .

(xii.) Currency, coinage, and legal tender."

(2) Sect. 4, sub-s. 1: "From and after six months after the commencement of this Act—

(a) a bank shall not issue, or circulate as money, any note or instrument for the payment of money issued by a State and payable to bearer on demand; and

(b) a note or instrument for the payment of money issued by a State and payable to bearer on demand shall not be a legal tender."

Sect. 5: "The Governor-General may authorize the Treasurer from time to time to—

(a) issue Australian Notes;

(b) re-issue Australian Notes; and

(c) cancel Australian Notes."

Sect. 6, sub-s. 1: "Australian Notes may be issued in any of the

Commonwealth Bank Act, 1911 (No. 18 of 1911, Commonwealth), established the Commonwealth Bank. The bank was not given authority to issue notes until a date subsequent to the transactions in the present case, and the notes which it then issued took the place of the Treasury notes. Under the Commonwealth Bank Act, 1920 (No. 43 of 1920, Commonwealth), the bank became a Bank of Issue. It had to establish a Note Issue Department, and its Board was given authority to issue, re-issue and cancel Australian notes. [They referred to the Commonwealth Bank Act, 1920, s. 60 G, sub-s. 1, s. 60 H, sub-s. 1. (1)]

At every material time there have been essential differences between the currency of Great Britain and that of Australia. From the passing of the Commonwealth Bank Act, 1911, the Commonwealth Parliament had power to take complete control of its currency, coinage and legal tender, and from that time there could have been divergencies of any magnitude between the currencies of the two countries. For

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following denominations, namely, Ten shillings, One pound, Five pounds, Ten pounds, or any multiple of Ten pounds, and shall—

(*a*) be issued from and bear date at the Commonwealth Treasury;
(*b*) be a legal tender throughout the Commonwealth and throughout all Territories under the control of the Commonwealth; and
(*c*) be payable in gold coin on demand at the Commonwealth Treasury at the Seat of Government."

Sect. 9, sub-s. 1: "The Treasurer shall hold in gold coin a reserve of not less than one-fourth of the amount of Australian Notes issued."

(1) Sect. 60 G, sub-s. 1: "Subject to this Act, the Board may from time to time—

(*a*) issue Australian notes;
(*b*) re-issue Australian notes; and
(*c*) cancel Australian notes."

Sect. 60 H, sub-s. 1: "Australian notes may be issued in any of the following denominations, namely, Five shillings, Ten shillings, One pound, Five pounds, Ten pounds or any multiple of Ten pounds, and shall—

(*a*) be printed and issued by the Board from the Commonwealth Bank;
(*b*) be a legal tender throughout the Commonwealth and throughout all Territories under the control of the Commonwealth except in respect of payments due by the Note Issue Department; and
(*c*) bear the promise of the Treasurer to redeem the notes in gold coin (or, in the case of a single five shillings Australian note, in silver coin) on demand at the Head Office of the Commonwealth Bank."

example, all coins coined at the Mint in London appear still to be legal tender in Australia: but there is no corresponding provision making silver, bronze or nickel coinage coined under the Coinage Act, 1909, legal tender in Great Britain. The effective currency of each country was in 1920 and is at present its paper currency. The same denominations are used in both countries, but they have different values in each. The documents in the present case must be construed on the assumption that in 1920 Australian currency was in fact and in law different from English currency. The only recent case in which Australian currency has been discussed is *Westralian Farmers, Ld.* v. *King Line, Ld.* (1) Bank-notes are part of the currency of a country: *Suffell* v. *Bank of England.* (2) Therefore the paper money of Australia which is authorized as legal tender is part of the currency of Australia. The company relies mainly upon the difference between the paper currencies of the two countries.

Sir Gerald Hurst K.C. and *H. S. G. Buckmaster* for a holder of debentures on the London register. On the terms of the contract, and having regard to the provisions of the Coinage Act, 1909, this was not a loan of Australian currency repayable in Australian currency, but a sterling loan repayable in pounds. There was in 1920 and there is now complete identity between the pound current in Great Britain and that current in Australia. The loan is repayable in gold, or in what is legal tender for gold, in the place of payment. The introduction of Australian notes and the use of British currency notes affected the law of legal tender and enabled the company to discharge its obligation in pounds by tendering Australian notes: but all that happened was that the law of legal tender was affected; neither the currency notes nor the Australian notes were turned into pounds. There is no such thing as an "Australian pound." The contract was to repay, on the drawing of the debentures, in whatever was legal tender for the pound at the place where the debenture holder elected to take repayment. The so-called "Australian pound" is simply a British pound minted in Australia. The Coinage Act, 1909 (No. 6 of 1909, Commonwealth), has no definition of the meaning of "British possession" as used in s. 7 of the Act (1), but a definition is given in the Coinage Act, 1870, s. 2, from which the Coinage Act, 1909 (No. 6 of 1909, Commonwealth), borrowed the phrase. (2) Legal tender in Australia was provided for by a proclamation made on August 1, 1896, under powers given to the Crown by the Coinage Act, 1870. That proclamation was withdrawn in 1911 in order to give effect to the Coinage Act, 1909 (No. 6 of 1909, Commonwealth). Sect. 4 of that proclamation was substantially reproduced by s. 5, sub-s. 1, of the Coinage Act, 1909 (No. 6 of 1909, Commonwealth) (3), which, however, did not include the provision in the last part of s. 4 of the proclamation. (4) As the proclamation was revoked as from the coming into force of the Coinage Act, 1909 (No. 6 of 1909, Commonwealth), that Act is all that the Court has to rely upon in determining the meaning of the contract of 1920 between the company and the debenture holders.

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(1) (1931) 47 Times L. R. 586; (1932) 48 Times L. R. 158, 598.

(2) (1882) 9 Q. B. D. 555.

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(1) Sect. 7: "Every contract, sale, payment, bill, note, instrument, and security for money, and every transaction, dealing, matter, and thing whatever relating to money, or involving the payment of or the liability to pay any money, which is made, executed, or entered into, done or had, shall be made, executed, entered into, done and had according to the coins which are current and are a legal tender in pursuance of this Act, and not otherwise, unless the same be made, executed, entered into, done or had according to the currency of some British possession or some foreign State."

(2) Sect. 2: "In this Act—. . . . the term 'British possession' means any colony, plantation, island, territory, or settlement within Her Majesty's dominions and not within the United Kingdom; . . . ."

(3) Sect. 5, sub-s. 1: "A tender of payment of money, if made in coins which are British coins or Australian coins of current weight, shall be a legal tender—

(a) in the case of gold coins, for the payment of any amount:

(b) in the case of silver coins, for the payment of an amount not exceeding Forty shillings, but for no greater amount: and

(c) in the case of bronze coins, for the payment of an amount not exceeding One shilling, but for no greater amount."

(4) Sect. 4: ". . . . Nothing in this Act shall prevent any paper currency which under any Act or otherwise is a legal tender from being a legal tender."

It would not be a breach of the contract to tender an Australian bank-note in payment in Australia. So far as concerns Australia, the payment would be good. But the contract remains a contract to pay pounds, which can be satisfied by paying either gold coins or what is legal tender for them at the place of payment. In substance it is a contract to pay in gold. There is, very naturally, no expression of Australian currency, because the pound in England and the pound in Australia were and are identical. There may have been slight differences in value from time to time: but the coins were identical in the sense of being of identical dimensions, quality and fineness, and inasmuch as those coined in Australia were coined at mints established there by proclamations simply as branches of the English Mint. In 1920, the company's obligation was to repay in gold or the equivalent legal tender at the place of payment. Australian notes were then legal tender, but they were not pounds. A promise to pay in pounds is prima facie a promise to pay in sovereigns. Under the Commonwealth of Australia Constitution Act, 1900, the Australian Parliament undoubtedly has power to deal with coinage and currency. It is clear that the only power of the Australian mints to issue gold coins is that given by the Coinage Act, 1870, and that, in 1920, the only coins other than silver and bronze which were current and legal tender in Australia were pounds minted in Australia. The contract must therefore prima facie be to repay, in each case, in the gold coins representing 100*l.* That is the effect of s. 7 of the Coinage Act, 1909 (No. 6 of 1909, Commonwealth). An analogous case is *In re Chesterman's Trusts.* (1) The document in the present case must be construed as creating an obligation to repay in England in legal tender for currency in Great Britain. The rule for determining the mode of performance of such a contract as that in the present case is given in Rule 161, Sub-rule 3, in Dicey's Conflict of Laws, 5th ed., p. 671, which states: "In the absence of countervailing considerations, the following presumptions as to the proper law of a contract have effect:—. . . . *Second Presumption.* When the contract is made in one country, and is to be performed either wholly or partly in another, then the proper law of the contract, especially as to the mode of performance, may be presumed to be the law of the country where the performance is to take place (*lex loci solutionis*)." That statement was quoted with approval and applied by the Privy Council in *Benaim & Co.* v. *L. S. Debono.* (1)

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(1) [1923] 2 Ch. 466.

In the present case the company's prima facie liability to repay in gold is modified only to the extent to which other legal tender is allowed by the law of the place of payment. As the debentures give to the debenture holders an option to elect to be paid in London, the company and the debenture holders must have contemplated that payment might possibly be made in some legal tender other than gold. The construction of the contract, which, in the events which have happened, is dischargeable only in London, is to be determined solely by the English law of legal tender in 1931.

H. B. Vaisey K.C. and *Gordon Brown* for another holder of debentures on the London register. The debentures, on their true construction, do not even show that the company was registered in Australia. The coupons make the sum of 3*l.* 10*s.* payable in London. The phrase "Australian pound," if it means anything, means a pound coined in Sydney or Perth. A contract to pay pounds is a contract to pay either in gold or in some other form which the law of the country of payment obliges the payee to accept in satisfaction of the debt. The contract is to pay 100*l.* in Australia or London at the debenture holder's option. If the debenture holder elects to be paid in London the company will tender 100*l.* The contract is perfectly plain and unambiguous and ought not to be construed in favour of the company. If the company intended that payment should always be made by reference to the state of the exchange between London and Melbourne the intention should have been made clear.

F. K. Archer K.C. and *J. H. Stamp* for a holder of debentures on the Melbourne register. There are two possible

(1) [1924] A. C. 514, 520.

constructions of the contract. Either it is a contract to pay the amount in what is legal tender for it in the place of payment, making allowance for the state of the exchange between the two countries, or it is a contract so to pay that amount without making that allowance. The latter is the more reasonable construction. The meaning of "pay one hundred pounds" is "pay one hundred sovereigns or the legal equivalent thereof." The crux of the present case is whether the legal equivalent is to be the legal equivalent in Australia or in the place where payment is demanded. The sovereign has the same definition in English, Australian, or any other law. In His Majesty's dominions it is a golden coin of a particular weight and fineness, and the legal equivalent is always defined in terms of that coin. For example, an English bank-note for five pounds is a legal equivalent. It is a promise to pay bearer on demand. It is not five pounds, but the Bank of England is absolved by law from giving effect to its promise to pay, and every one in England is bound to accept its promise to pay in a particular way, and a bank-note, e.g. for five pounds, is equivalent to the five sovereigns of the defined weight and fineness. The case was precisely the same in Australia in 1920, and is precisely the same there now. One of the vital elements in construing this contract is the consideration of the meaning of "pound." If its meaning is the foundation of the same measure in every part of the Empire, there can be attributed to the denomination "pound" a meaning which will take its colour from the country to which it is applied. If "pound" meant a silver coin in Australia and a gold coin of a quite different value in London, it would be difficult to say that these debentures were giving to the holders the option to be paid a silver coin in Australia or a gold coin of, e.g., ten times its value in London.

[MAUGHAM J. If this debenture was issued to-morrow in precisely the same form there would be the strongest possible ground for saying that the company did not intend to pay in English pounds.]

It is hardly conceivable that a contract entered into to-day, in existing market conditions, could be framed as this one was without deliberate intent to deceive, because no one handling finance to-day could possibly disregard a difference of 25 per cent. in value in the two markets. The point would arise in limine, which in the present case it did not. The question is, what did this contract mean in 1920, when it was entered into? Regarding it as at that date, and considering that the pound was of identical definition and significance all over the world, and that its only variation was that obligations to pay it were satisfied by handing over in different places promises by different banks to pay it, the natural meaning of the contract was to pay pounds in accordance with the contract and irrespective of the form in which payment was being made. The difference was in 1920 one of form only, not of substance : now it is a difference in effect.

F. R. Evershed, for the trustees of the debenture trust deed, adopted all the arguments on behalf of debenture holders.

Spens K.C. in reply. The pound and the sovereign are not identical. The pound is a unit of measurement only in those parts of His Majesty's dominions where the gold sovereign is legal tender. It may well be that in some parts of them it is not legal tender. It is a fallacy to suggest that the pound and the gold sovereign are identical for the purposes with which the Court has here to deal. If the obligation under the allotment letters was to pay 100*l.* in Australia at the Commonwealth Bank of Australia, and if in fact in 1920 the exchange was against this country, the subscribers to this loan would have had to make arrangements with their bankers in London for payment by them in Australia of 100*l.*, and for that purpose they might have had to pay slightly over 100*l.* As the security is Australian, what the trustees, if they had to enforce the security, would in fact get out of the debentures and under them is what remains unpaid, and the company would discharge its obligation to the trustees by finding that amount in Australian currency. The debentures contain no obligation to pay 100*l.* in London. There is an obligation to pay 100*l.*, and there is an obligation that the moneys secured shall, at the option of debenture holders, be paid as to principal in London. The obligation is to pay the amount in Australian currency in Australia or the equivalent amount in English currency at the due date of payment of those amounts.

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July 21. Maugham J. [after stating the facts as set out above :] The question that arises is whether sums payable by the company in London in respect of interest on such debentures or any of them ought to be paid in Australian currency converted into sterling at the rate of exchange current in London on the due date for payment or ought to be paid in sterling without any allowance for conversion from Australian currency. It should be added that the same question arises as regards sums payable by the company in London in redemption of debentures and as regards the payment of the debentures when the same become due in accordance with the conditions on which they were issued. In considering these questions I am entitled, I think, to take into account the fact that prospectuses were issued both in England and in Australia inviting subscription of the debentures and that a certain though a small number of subscriptions was obtained in London. At the date of the last drawing of debentures for redemption under the sinking fund provisions—namely, on October 7, 1931, there were 6672 of the debentures outstanding, of which 6535 were on the Melbourne register and 137 were on the London register. Certain of the holders resident in Australia of debentures registered on the Melbourne register and drawn for redemption at the date mentioned required payment to be made to them in London pursuant to the option as to place of payment conferred by condition 12 of the conditions indorsed on the debentures. This circumstance is due to the fact that there has been a considerable depreciation in the value of the pound in Australia as compared with the value of the pound in England since the month of March, 1930 ; and on March 31, 1932, the rate of exchange in London from Australian into English currency was approximately sixteen shillings English for each one pound Australian, so that in effect 100*l*. English was equivalent to 125*l*. Australian in the case of a telegraphic transfer from London to Australia, while in the case of such a transfer from Australia to London 125*l*. Australian would be converted into 100*l*. English.

What, then, is the true construction to be placed on a contract made in Australia to pay a definite number of pounds contained in a debenture issued in September, 1922, conferring an option on the holder to require payment either in Australia or in London? The contract must, I think, be construed according to Australian law, but this has been taken by all the parties as being the same as the law of England, except so far as the Australian legislation referred to in the affidavit of Mr. David Maughan K.C., an eminent Australian counsel, affects the matter.

Three possible views have been urged before me: first, that the word "pounds," including the well-known symbol for the word, means gold pounds; secondly, that the word indicates that the obligation to pay may be satisfied at the option of the company by tendering pounds in gold or by making any tender which is lawful in Australia as the law of the contract, with the result that the holder requiring payment in London must accept the lawful English equivalent of the amount payable in Australia according to the current rate of exchange; thirdly, that the word indicates that the obligation may be satisfied by tendering pounds in gold or by making in London a tender which is a lawful tender for gold pounds here, or by making in Australia a tender which is a lawful tender for gold pounds in that country.

The Commonwealth of Australia was established by a proclamation made pursuant to the Statute 63 & 64 Vict. c. 12, and the Commonwealth was given (inter alia) full powers to make laws with respect to currency, coinage and legal tender.

The first Act relating to coinage in Australia was the Coinage Act, 1909, No. 6 of 1909. That Act made provision for the issue of Australian coins, and empowered the Treasurer to issue silver and bronze coins of specified denominations. Gold coins were to be of precisely the same standard weights and standard fineness as those of British coins which had been issued in accordance with the laws of the United Kingdom. A tender of payment in money, if made either in British coins or Australian coins of current weight, was to be a legal tender in the case of gold coins for the payment of any amount. I need not pause here to state the position as regards silver coins as tender for an amount not exceeding forty shillings and of bronze coins as tender for an amount not exceeding one shilling. The Act contained a clause, taken from the Coinage Act, 1870, of the United Kingdom, in the following terms: "Every contract, sale, payment, bill, note, instrument, and security for money, and every transaction, dealing, matter, and thing whatever relating to money, or involving the payment of or the liability to pay any money, which is made, executed, or entered into, done or had, shall be made, executed, entered into, done and had according to the coins which are current and legal tender in pursuance of this Act, and not otherwise, unless the same be made, executed, entered into, done or had according to the currency of some British possession or some foreign state."

Prior to the date of this Act coins had been issued from mints in Australia, but such mints were branches of the Royal Mint in England established by the authority of United Kingdom statutes, and the coins so issued were British coins. I was informed at the hearing that the power of making and issuing Australian gold coins in Australia had not been exercised.

By an Act relating to Australian notes, No. 11 of 1910, the Governor-General was empowered to authorize the Treasurer to issue and re-issue Australian notes in a number of denominations, and s. 6 provided that Australian notes should be a legal tender throughout the Commonwealth and throughout all territories under the control of the Commonwealth, and should be payable in gold coins on demand at the Commonwealth Treasury at the seat of Government. Sect. 9 provided for a certain reserve in gold coins appropriate to the amount of Australian notes—namely, not less than one-fourth of the Australian notes issued up to 7,000,000*l.* and an amount equal to the amount of Australian notes issued in excess of 7,000,000*l.*

The Commonwealth Bank Act, 1911, No. 18 of 1911, provided for the establishment of the Commonwealth Bank of Australia and conferred upon the bank a number of powers. The Act was amended from time to time; and, by the Commonwealth Bank Act, 1920, No. 43 of 1920, being the Act in force at the date when the debentures were issued, provision was made for the issue of Australian notes by the Board of the Bank (s. 60 G), and the provision above stated as to such notes being a legal tender throughout the Commonwealth and throughout all territories under the control of the Commonwealth was in substance repeated (s. 60 H). The provision as to gold reserve was that the Board should hold in gold coins and bullion a reserve of an amount not less than one-fourth of the amount of the Australian notes issued.

It is clear from the above statement that Australian notes are not and were never intended to be legal tender in this country. I may perhaps usefully add that the British Act relating to coinage is the Coinage Act, 1870, of which s. 6 is in precisely the same terms as s. 7 of the Australian Coinage Act of 1909. The Act was not intended, of course, to interfere with the Bank of England Act, 1833, by s. 6 of which bank-notes, subject to a condition no longer applicable, were to be a legal tender for all sums above 5*l.* except at the bank and branches of the bank. The legal character of the Bank of England note was explained by the Court of Appeal in *Suffell* v. *Bank of England* (1), and it may be noted that Sir George Jessel M.R. pointed out that such a note is part of the currency of the country.

In my opinion a contract to pay money must be construed bearing in mind any legislation as to what is legal tender.

(1) 9 Q. B. D. 555.

A contract to pay so many pounds, whether a British or Australian contract, was not in 1920, and still less is now, a contract to pay in gold, but is prima facie a contract to pay money according to the currency of the country where payment has to be made. (For the present position in Great Britain, see the Gold Standard Act, 1925, and the Amendment Act, 1931; and in the Commonwealth, the Acts No. 31 of 1929 and No. 6 of 1931.)

I have thought it necessary to examine the Australian legislation relating to currency, coinage and legal tender in order to ascertain whether there was in October, 1920, when the debentures were issued, any coin or other measure of value which could with legal correctness be described as an Australian pound. If the answer had been in the affirmative, it might well have been possible to contend that the pounds referred to in the debentures were Australian pounds, just as a similar debenture, if issued in Canada, might well be a contract to pay Canadian dollars. But I am unable to find that in 1920 there was any such a standard of value in Australia, whether it consisted of metallic or paper money, as an Australian pound. There were British sovereigns, minted in Australia by branches of the Bank of England. There were Australian bank-notes which were, however, legal tender only in Australia. There was a power in the Australian Commonwealth to mint gold coins in Australia; but the Australian statute provided that they were to be of precisely the same gold content as a British sovereign; and, in fact, no such coins had been issued. I must, therefore, hold that the contract cannot be treated as referring to an Australian measure of value or medium of exchange.

There remains only the question whether there is to be implied in the terms of the option given to the debenture holders a term to the effect that, if at any time there should be a difference in the exchange value of a pound in England and a pound in Australia, to the disadvantage of the latter, the holder who asked for payment in London would be bound to accept not the nominal value of the pounds named in his debentures or coupons, but the English equivalent of the

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amount payable in Australia according to the current rate of exchange. I can see no sufficient ground for coming to any such conclusion. The contract is contained in a commercial document and the words must be construed according to their ordinary and popular meaning. From this point of view it is difficult to see why a holder demanding payment in London of, say, 100*l.*, should be bound to accept something less in the absence of an express clause to that effect. It is true that, if this view prevails, the obligation to pay the amount due in English currency may have the effect of upsetting the arrangements as to the sinking fund, since that fund will no longer suffice to discharge the whole amount secured by the debentures. The weight of this consideration is, however, greatly diminished by the circumstance that the event which has happened—namely, the departure of both England and Australia from the gold standard with a resulting difference in the exchange value of the pound, was not contemplated either by the company or by the subscribers to the debentures in 1920. It may be added that, if there is any ambiguity, the present case is one where the words used are those chosen by the company and, accordingly, the maxim "Verba fortius accipiuntur contra proferentem" is applicable.

For these reasons I must come to the conclusion that the contentions put forward on behalf of the company must fail, and that every debenture holder requiring payment in London is entitled to receive payment in sterling without deduction on account of the exchange value of the pound in Australia.

K. R. A. H.

C. A.

The company appealed. The appeal was heard on October 27, 31; November 1, 1932.

C. E. E. Jenkins K.C. and *D. Ll. Jenkins* for the appellants.

F. R. Evershed for the trustees of the trust deed.

Sir Gerald Hurst K.C. and *J. H. Stamp* for the various debenture holders.

The arguments were substantially the same as those used in the Court below. The following additional cases were referred to: *Russian Commercial and Industrial Bank* v. *British Bank for Foreign Trade, Ld.* (1); *Cash* v. *Kennion* (2); *Chatenay* v. *Brazilian Submarine Telegraph Co.* (3)

Cur. adv. vult.

Dec. 19. The following written judgments were delivered:

LORD HANWORTH M.R. This is an appeal from the decision of Maugham J. upon an originating summons taken out to obtain a declaration as to the true construction and meaning of certain debentures issued by the company in October, 1920.

The facts and details relating to the case are so fully stated by Maugham J. that it is unnecessary to repeat them, and I have referred only to some features that are necessary to explain this judgment.

These "B" debentures were secured by a trust deed dated October 29, 1920, and the supplemental trust deed dated September 19, 1921, which provided for opening a London register of the holders of the debentures.

The prospectus preceding the issue of the debentures contains the following statements: "Interest will be payable free of exchange half-yearly at the head office and branches of the Commonwealth Bank of Australia as hereinafter provided on the 1st April and 1st October." "Stamp duty originally payable in any place on the first issue or delivery will be paid by the company, but any further or other duty (if any) will be payable by the holder." "Exchange must be added to all country cheques."

Two resolutions were passed on September 22, 1920, the first resolving that the sum of 1,500,000*l.* should be raised by the issue of 15,000 second mortgage debentures of 100*l.* each, and the second that the London Board should be authorized to make allotments in respect of any portion of that issue.

At the time that the debentures were issued the rate of exchange between London and Australia and from Australia to London was so close as to be a matter of not much importance. At the present time there is a wide divergence between these rates. In order to provide 100*l.* in the City of London it is necessary to pay 125*l.* in Australia or thereabouts. It is now, therefore, of great moment whether under the terms of the trust deed and the debentures themselves, repayment can be made as well in London as in Melbourne, or elsewhere in Australasia, in terms of Australian currency, or whether, if made in London, the repayment must be made in English currency.

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(1) [1921] 2 A. C. 438.

(2) (1805) 11 Ves. 314.

(3) [1891] 1 Q. B. 79.

There are no facts in dispute, and moreover it is accepted on both sides that the statement that interest will be payable "free of exchange" refers to what may be called bankers' charges on the remission of a sum of money from one State to another, a charge such as is, or used to be, made for cashing a cheque on a Scottish bank in London, and that these provisions do not afford any solution of the question now propounded as above.

We have had an interesting argument presented to us as to the currencies of both the United Kingdom and Australia, beginning with Lord Liverpool's Act in 1816 (56 Geo. 3, c. 68), which by s. 11 established a mono-metallic system and made gold coin alone legal tender for payments to any amount, and withdrew silver from being equally legal tender as theretofore, and made silver a legal tender to a limited amount only, up to forty shillings. Incidentally, it was by a Proclamation issued after this Act that gold coins of a new denomination, namely, sovereigns, were proclaimed current.

Then our attention was directed to the Bank Act of 1833 (3 & 4 Will. 4, c. 98), which by s. 6 made bank-notes legal tender, "so long as the Bank of England shall continue to pay on demand their said notes in legal coin."

The Coinage Act of 1870 (33 Vict. c. 10) provided by s. 6 that "Every contract, sale, payment . . . . and every transaction, dealing, matter, and thing whatever relating to money, or involving the payment of or the liability to pay any money, which is made, executed, or entered into, done or had, shall be made, executed, entered into, done and had according to the coins which are current and legal tender in pursuance of this Act, and not otherwise, unless the same be made, executed, entered into, done or had according to the currency of some British possession or some foreign state."

When the Great War came, an Act, passed two days after its commencement, provided that the Treasury might issue currency notes for 1*l.* and 10*s.*, and that those notes should be current in the United Kingdom as fully as sovereigns and half-sovereigns were then current, and should be legal tender in the United Kingdom for the payment of any amount.

This was the system of currency and the mode of legal payment existing in the United Kingdom when the debentures were issued. What happened afterwards, such as the withdrawal of Treasury notes, and their replacement by bank-notes of similar denomination, is of interest, but has no relevance to matters as they stood in 1920.

The provision for currency and for payments in Australia was made by a series of statutes and proclamations, cognate in their purpose, and not much dissimilar in form; and thereunder a system was developed on lines parallel to that in England.

By the Coinage Act of the Commonwealth, 1909, s. 5: "A tender of payment of money, if made in coins which are British coins, or Australian coins of current weight, shall be a legal tender"—gold coins for any amount, silver up to forty shillings and no more. Sect. 7 of this Act is in the same terms as s. 6 of the Act of 1870 above set out; and in the Schedule the standard weights and fineness are prescribed of the gold coins, that is, of five pounds, two pounds, sovereigns and half-sovereigns, the coins being alike in these features according to their values, the sovereign being exactly one-half of the two pound coin.

In 1910, by Act No. 11, Australian notes of ten shillings, one pound, five pounds, ten pounds, or any multiple of ten pounds issued from the Commonwealth Treasury were made legal tender throughout the Commonwealth. and all territories under the control of the Commonwealth.

The same standard of gold value as in England was fixed by No. 31 of 1929, s. 2, sub-s. 3, sub-head (*a*). Thus payments could be made in Australia by Australian notes, representing coins of the identical value as the British coins. It is at this point that the identity ceases. The value of the note depends upon the likelihood that when presented it will be cashed in coin. That prospect is estimated differently in Australia and in London, with the result that however close in fineness of gold the coins may be which are the response to the presentment of the note, the expectation that that response will be fulfilled is measured approximately at four to five in Australia as compared with London ; or, to express it in terms of notes, 125 Australian notes must be taken to represent the value of 100 Bank of England notes.

The debentures provide for repayment upon the winding-up of the company, and that procedure must be conducted in the place where the company was registered, that is, Melbourne. They also made provision for an earlier repayment up to 1927, and after that date, if and when any debenture is drawn for that purpose, the drawing is also to be at Melbourne. Clause 12 of the conditions provides for an option as to the place of repayment, which can be at any office of the Commonwealth Bank of Australia in Sydney, Melbourne, Adelaide or London. No provision is made as to whether there is to be any divergence between what is to be paid in Australia or London. The coupons attached to the debenture also contain these options as to the place of payment and add Perth, Brisbane or Hobart, and in express terms only provide that, after the original stamp has been paid by the company, any further cost of stamping is to be borne by the payee.

If the contention is well founded that, wherever payment is made, it is to be made in the Australian value of money, there is little merit or importance to be attached to this condition that payment may be made at the option of the payee in London. It is an easy and inexpensive banking operation to effect a transfer from Australia to London, or the reverse way, and one which any payee could arrange at small, if any, cost to himself. It is possible that in circumstances such as prevailed in 1920, no charge would be made to the payee, because the exchange might reimburse the bank and the difference be so negligible as not to require attention on either side.

The rules of law that govern a contract have been expressed by Professor Dicey in his book on the Conflict of Laws (see 5th ed., p. 672) as follows: "In the absence of countervailing considerations, the following presumptions as to the proper law of a contract have effect:—*First Presumption.*—*Prima facie* the proper law of the contract is presumed to be the law of the country where the contract is made (*lex loci contractus*); this presumption applies with special force when the contract is to be performed wholly in the country where it is made, or may be performed anywhere, but it may apply to a contract partly or even wholly to be performed in another country. *Second Presumption.*—When the contract is made in one country, and is to be performed either wholly or partly in another, then the proper law of the contract, especially as to the mode of performance, may be presumed to be the law of the country where the performance is to take place (*lex loci solutionis*)."

These propositions are based upon the probable intention of the parties and their effect has judicial approval in *Lloyd* v. *Guibert* (1) in the judgment of Willes J., and from Bowen J. in *Jacobs* v. *Crédit Lyonnais* (2), and Lord Esher in *Chatenay* v. *Brazilian Submarine Telegraph Co.* (3), where he says: "But if it" (the contract) "is to be carried out partly in another country than that in which it is made, that part of it which is to be carried out in that other country, unless something appears to the contrary, is taken to have been intended to be carried out according to the laws of that country." See also *Benaim & Co.* v. *L. S. Debono.* (4)

These propositions may be taken to apply to the present debenture. If so, when the debenture is presented for payment in London, it ought to be paid in English currency.

(1) (1865) L. R. 1 Q. B. 115, 122.
(2) (1884) 12 Q. B. D. 589, 600, 601.
(3) [1891] 1 Q. B. 79, 83.
(4) [1924] A. C. 514, 520.

There is no express provision that any other currency is admissible, and if so there is no justification or excuse for declining to follow the rules as to payment laid down in s. 6 of Professor Dicey's book already quoted.

But there is another consideration which has weight with me, and is in accord with the observations of Bowen L.J. made in *Jacobs* v. *Crédit Lyonnais* (1) in reference to a contract that is partly to be performed in one place and partly in another. He says: "In such a case the only certain guide is to be found in applying sound ideas of business, convenience, and sense to the language of the contract itself, with a view to discovering from it the true intention of the parties."

It seems to me that this debenture is intended to be a commercial document, and to be understood by, and to be attractive to, commercial men, and thus the option of payment in London was inserted, in addition to the opening of a London registry, in order to attract investors upon the London market. The supplemental trust deed of September 19, 1921, stated in express terms that the London register of debenture holders was established "in order that a quotation for such debentures may be obtained on the London Stock Exchange." If the condition and its result now contended for had been written out at large, it would, in my opinion, have had a deterrent, not an attractive effect. It would have run: "You may require payment in London, but if you do, you will be paid the value of 100*l*. in Australia and not in sterling in London." Such an interpretation appears to me to refute the acceptance of it as the true effect and purpose of the option, and the probable intention of the parties.

While, therefore, I have found the case a difficult one and not easy of solution, I have come to the same conclusion as Maugham J., if not upon quite the same grounds, and I agree with the declaration that he made. In my judgment, the appeal ought to fail, but, as I regret to find myself expressing an opinion divergent from my learned brothers, the order upon the appeal will be that which Lawrence L.J. will declare.

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(1) 12 Q. B. D. 589, 601.

Lawrence L.J. The question to be determined on this appeal is whether, on the true construction of the debenture trust deed, the sums payable by the company in London for interest upon, and in redemption of, the second debentures thereby secured ought to be paid in Australian currency converted into sterling at the rate of exchange current in London on the due date for payment, or in sterling without any allowance for conversion from Australian currency.

As the relevant law for determining the rights of the parties under the debentures is admittedly the same in England and in Australia, and as the same canons of construction admittedly prevail in both these countries, it is, in my opinion, unnecessary to determine whether the law of England or the law of Australia is the proper law of the contract; in either case the question which the Court has to determine is whether, according to the true meaning of the trust deed, the sums in dispute are payable in sterling or in Australian currency. That there is a clear distinction between the two currencies is not disputed, indeed it is this distinction which has given rise to the present proceedings. Since the recent departure of both England and Australia from the gold standard the difference between the two currencies has been much accentuated, as is shown by the fact that at the commencement of these proceedings the Australian pound in terms of sterling was 16*s.*

In the course of the argument, counsel have called our attention to the English and Australian legislation relating to currency, coinage and legal tender. However interesting this legislation may be as showing what the legal metallic and paper currency consists of and what is legal tender in each of the two countries concerned, it does not seem to me to afford any assistance in determining the question whether the company has agreed to pay the sums in dispute in Australian currency or in sterling. When that question has been decided there is no difficulty as to the manner in which the payment ought to be made. As a matter of fact the parties are agreed that, if the sums payable in London ought to be paid in Australian currency, the proper way in which the company ought to discharge its obligation is by paying an equivalent amount of sterling at the current rate of exchange on the due date for payment.

The only cause of difficulty in this case is the fact that Australia has adopted the same standard unit of value for its currency, and the same name and symbol to indicate that unit, as England; consequently, where the term "pound" and the symbol "£" are used in a document (such as the trust deed in this case), the question arises whether that term and that symbol are, as a matter of construction, intended to denote the Australian pound or the pound sterling.

In determining that question in the present case regard must be had to the following essential facts: The company is a company incorporated in the State of Victoria under the Australian Companies Acts, having its head office in Melbourne. On September 22, 1920, the directors of the company, at a board meeting held in Melbourne, passed a resolution: "That the sum of £1,500,000 be raised by the issue of 15,000 second mortgage debentures of £100 each bearing interest at the rate of 7 per cent. per annum" (to be secured as therein mentioned) "and that such debentures be issued at £97 per centum payable in instalments as follows." Then follow the particulars as to the instalments.

The trust deed to secure this debenture issue was prepared and executed in Melbourne. It is dated October 29, 1920, and after appointing Australian trustees and creating a specific and floating charge over the company's mines and other property in Australia, it provided (inter alia) for the establishment in the joint names of the trustees and the company in the Commonwealth Bank of Australia of a sinking fund at the rate of £75,000 per annum for twenty years for the redemption of the whole debenture issue by purchase up to September, 1927, and thereafter by yearly drawings, and that every debenture drawn should become payable and be redeemed at par. The trust deed further contained a power to the trustees in the events therein mentioned to take possession of and sell the property charged, and to apply the net proceeds of such sale in payment pari passu of all principal moneys and interest payable in respect of the debentures, and, subject thereto, to hold the proceeds in trust for the company. The second schedule to the trust deed contains the form of debenture and the conditions to be indorsed on each debenture. The trust deed was registered as a mortgage at the Melbourne Registry under s. 101 of the Australian Companies Act, 1915.

In these circumstances I do not think it open to reasonable doubt that, prima facie, the word "pounds" and the symbol "£," whenever used in the resolution creating the debenture issue and in the trust deed and debentures securing that issue, were intended to indicate Australian pounds and not pounds sterling, and, accordingly, that all the sums of money mentioned in the trust deed, and in the debentures, were intended to be sums of Australian pounds and not sums of pounds sterling.

It is not suggested that, under the terms of the debentures, the company bound itself to pay either the principal moneys or the interest thereby secured (whether payable in Australia or in London) in metallic currency; therefore the fact that under the Australian legislation British coins are part of the metallic currency of, and are legal tender in, Australia may be disregarded: nor is it suggested that under the terms of the debentures all the principal moneys and interest thereby secured (wherever payable) are payable in sterling.

The contention of the debenture holders is that under the terms of the debentures the company contracted to pay such sums in respect of principal moneys and interest as might become payable in Australia in Australian currency, and such sums in respect of principal moneys and interest as might become payable in London in sterling; in other words, that the trust deed and debentures operated to secure, not sums in one currency only, but sums consisting of a mixture of Australian currency and sterling in unknown proportions, according to whether any debenture holder or debenture

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holders should elect to be paid in Australia or in England. This contention is based on clause 12 of the conditions indorsed on each debenture, whereby it is provided that the moneys thereby secured would be paid as to principal at any office of the Commonwealth Bank of Australia in Sydney, Melbourne, Adelaide, or London, at the registered holder's option, and as to interest, either at any such offices or at the said bank's offices at Perth, Brisbane, or Hobart, and also on the provision contained in the coupons annexed to each debenture that the half-yearly payments of interest are payable at any office of the Commonwealth Bank of Australia in Sydney, Melbourne, Brisbane, Adelaide, Perth, Hobart, or London, at the cost of the holder as to any further stamp or other duty.

It is to be observed that in these provisions there is no express stipulation that, if the debenture holder should elect to be paid in London, he would be paid in sterling, and the question is whether, in the circumstances, such stipulation ought to be implied. In my opinion, the true inference to be drawn from the trust deed and debentures as a whole is that the option to be paid at one or other of several named towns (all of which, with one exception, are situate within the Commonwealth of Australia) was given solely for the purpose of enabling the debenture holders to cash their coupons, and collect their redemption moneys, at places which might be more convenient to them than Melbourne, and that the mere fact that one of the named towns (namely, London) was situate outside the Commonwealth does not carry with it the implied stipulation that, if a debenture holder elects to be paid at that particular place, he will be paid in a currency differing from that in which all the other debenture holders will be paid.

In this connection it is, perhaps, not without significance that all the payments for interest and redemption moneys (including those to be made in London) were to be made at one or other of the offices of the company's bankers, the Commonwealth Bank of Australia.

As each debenture secures the payment of an aliquot portion of the total sum of £1,500,000 which the company had resolved to raise, and as that total sum was a sum of Australian pounds and not a sum of pounds sterling, it follows, in my opinion, that the aliquot part of that sum secured by each debenture is also a sum of Australian pounds, and not a sum of sterling.

If Australia had adopted any symbol other than "£" to indicate the Australian pound (for instance, the symbol "£ A.") no question could have arisen. The fact that both the pound sterling and the Australian pound have the same designation and are indicated by the same symbol cannot, however, in my opinion, operate to make the same sum mean one thing in England and another thing in Australia; it means either a sum of pounds sterling or a sum of Australian pounds in both countries. For myself, I am unable to see how the same sum of money mentioned in any given debenture or coupon can be construed to mean a sum of sterling in the event of the debenture or coupon being presented for payment in London and a sum of Australian currency in the event of the debenture or coupon being presented for payment in Australia.

My opinion that all principal moneys and interest secured by the debentures, wherever payable, were sums of Australian currency is fortified by the provision contained in the trust deed as to the payment by the company to the trustees of the sum of £75,000 per annum for the redemption of the debentures (which annual sum could only be legally discharged by payment in Australian currency, and would, therefore, be satisfied by the payment of Australian bank-notes), and by the provision as to the pari passu distribution of the proceeds of sale upon a realization, which proceeds would be received by the trustees in Australian currency. Moreover it is plain that a debenture holder could only enforce his security in Australia and that, if he were to take proceedings in Australia for that purpose, a tender or payment into Court of the amount expressed to be secured by his debenture with arrears of interest and costs in Australian currency would be a complete answer to his claim.

If it be legitimate to look at the results of the contentions on either side from a business point of view, as we were invited to do by the respondents' counsel, I think that the balance is largely in favour of the view I have expressed. The view of the respondents, if correct, would result in the company not knowing beforehand how much money would be required to pay the half-yearly interest on the debentures, or how many debentures ought to be drawn for redemption, and would completely upset the arrangements as to the sinking fund. It is fairly obvious that, if the respondents' contention were to prevail, the bulk of the Australian debenture holders will, as matters stand at present, exercise the option to be paid in London; and, on the other hand, if Australia had followed the example of South Africa and had remained on the gold standard and the value of the Australian pound had been of greater value than the pound sterling, the bulk of the English investors would no doubt exercise the option to be paid in Australia.

It was admitted by Sir Gerald Hurst that, if one of the places where the debenture holders might have elected to be paid had been Paris and the option to be paid there had been exercised, the company would have had to pay the sum due in Australian currency converted into francs at the rate of exchange prevailing on the due date for payment. The only distinction between such a case and the present is that in the latter the two currencies (though in fact different) have the same designation and symbol, whereas in the former the currencies are not only different in fact but also have different designations and symbols.

It cannot, in my opinion, make any difference in principle that the question has arisen between two Empire currencies, and not between a British and a foreign currency. The underlying principle in both cases is the same—namely, that if a contract, on its true construction, provides that a sum of money in the currency of the locus contractus shall be paid in another country having a different currency, the contract must be fulfilled according to its tenor, and the obligation of the debtor must be discharged by paying the sum in the currency in which it is contracted to be paid; or, which comes to the same thing, by paying an equivalent amount in the currency of the country where it is to be paid, according to the ruling rate of exchange.

Counsel for the respondents laid some stress on the fact that a prospectus was issued in London offering the debentures for subscription in England and on the fact that the company had established a London register. A perusal of this prospectus, however, shows quite plainly that it was an Australian prospectus, and that it invited applications for an Australian debenture issue to be secured on mining property in Australia, and, consequently, that all the sums mentioned in the prospectus must have been intended to have had reference to Australian currency. I should have thought that an English investor in such a concern would have realized that any fluctations in the rate of exchange of the Australian pound would affect the value of the capital invested in, and the interest to be derived from, that investment, just as much as any fluctations in the rate of exchange of the Canadian dollar would affect the capital and income of an investment in a Canadian concern; and none the less so because, under the terms of the debentures, he could get paid what was due to him in respect of his investment in London.

As regards the London register, this was no doubt established by the company for its own administrative purposes, and its establishment cannot, in my opinion, affect the question which has now arisen.

Moreover, the contention based on this prospectus and register loses much of its weight owing to the fact that the option to be paid in London is not confined to investors who invested on the faith of that prospectus, nor to investors whose names happen to be entered in that register, but is given to all the debenture holders; so that, if the respondents' contention be well founded, every Australian as well as every English debenture holder could compel the company to pay him the face value of the principal and interest secured by his debenture either in sterling or in Australian currency, whichever at the moment might suit him best, a result

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which seems to me somewhat strange, and can hardly have been intended.

In the result, for the reasons stated, I have come to the conclusion that, on the true construction of the debentures, and of the annexed coupons, there is no implied stipulation that, in the event of the debenture holder exercising his option to be paid in London, the company would pay the principal moneys and interest thereby secured in sterling, and not in Australian currency.

In my opinion, therefore, this appeal should be allowed, and in lieu of the declaration made by Maugham J. there should be a declaration that the sums payable by the company in London in redemption of, and for interest on, the debentures in question ought in all cases to be paid in Australian currency converted into sterling at the rate of exchange current in London on the due date for payment thereof.

ROMER L.J. The problem to be solved upon this appeal is one of considerable difficulty. It may be stated as follows. An English " pound " contains the same quantity of gold as do 4.866 American " dollars." If, however, in 1920 an American company agreed to pay in London 4.866 dollars, and assuming that it had not contracted to pay in gold, its obligation would not, of course, be discharged by making legal tender for 100*l.* sterling, but by payment of English currency forming a legal tender according to English law for the amount of sterling that is equivalent to 4.866 dollars at the current rate of exchange. It is equally clear that, if it should have agreed to pay 100*l.* sterling, its obligation could only be discharged in English currency forming a legal tender for that amount, for, in the first case, the contract to pay is expressed in terms of the standard unit of value in the United States. In the second case it is expressed in terms of the standard unit of value in this country.

What then is to happen where, as in the present case, a contract was made in 1920 by an Australian company to pay money here, the amount being expressed in terms of the standard unit of value that is common to both countries ?

Maugham J. came to the conclusion that for the purpose of discharging the obligation of the appellants in the present case, their contract is to be treated on the footing that it is expressed in terms of English currency, on the ground, as I read his judgment, that there was not in October, 1920, any coin or other measure of value that could be described as an Australian pound. That there was no such coin is true; but I cannot agree that there was no "measure of value" that could be described as an Australian pound, if by that phrase the learned judge meant "standard unit of value," for Australia had in 1920 its own currency system and every such system must be based on a standard unit of value, and where that standard unit is gold it consists of a fixed weight of that metal of a determined fineness. It varies, of course, in different countries. In the United States the standard unit is the dollar, consisting of a weight of gold considerably less than the weight of our pound and of a slightly different fineness. In Australia the standard unit adopted might well have consisted of a unit differing in weight and fineness from that of either country. As it happened, it adopted the same unit as ours and called it by the same name. It is this that creates the difficulty in the case. The fact, too, that according to Australian law the English sovereign is made legal tender for their standard unit of value creates further difficulty. Indeed, if it had not been for this fact, I think that Maugham J. would have decided this case in favour of the appellants. The difficulty, however, disappears if one bears in mind that the standard unit of value and the things that are legal tender for that unit are different conceptions. Had Australia adopted precisely the same weight and fineness for its standard unit, but called the unit by a different name, or, calling it by the same name, had adopted a different symbol for indicating it, the present question could not have arisen; but, though it is given the same name and symbol as ours, and consists of the same weight and fineness as ours, and our sovereign is one of the things that is legal tender for it, it does not follow that there is no Australian "pound." The truth is that one is very apt to use the word "pound" as denoting the coin that is called a sovereign, and which contains the exact amount of gold that constitutes the standard unit of value. In nearly all currencies there is a coin corresponding to the standard unit, but this is not essential. When in early times the English unit of value was the pound weight of silver there was not any corresponding coin, just as there is no coin in Portugal corresponding to the Portuguese unit of value that is called the rei. In the former case the coin would have been too large for practical use. In the latter case it would be too small. It would, however, be misleading to say that in those early days there was no English pound, or that at the present time there is no Portuguese rei, unless it be made clear that reference is being made to coins and not to standard units of value.

These considerations seem to make it necessary to ascertain the meaning to be attributed to an English contract to pay so many pounds in England whether expressed in words or in the equivalent symbol. Unless it be a contract to pay in gold, it is not a contract to pay so many coins. It is a contract to pay so many standard units of value by tendering coins or notes or other legal tender for the amount, and prima facie the standard unit of value would be taken to be the English pound.

In my judgment the meaning is precisely the same if the contract is to be fulfilled, say, in the United States, again assuming that it is not one for the payment in gold. The debtor could discharge himself by handing over whatever might be the legal tender for the amount, for, as pointed out in effect by Russell J. in *In re Chesterman's Trusts* (1), an obligation to pay a sum expressed in terms of a particular currency is properly discharged in whatever, at the due date of payment, is legal currency in the country whose money is made the subject-matter of the contract. For practical convenience, of course, in the case of a contract to pay sterling in the United States the payment would be made in the equivalent American currency calculated at the prevailing rate of exchange, just as an obligation to pay francs in this country would in practice be discharged by payment of English currency. In such a case, however, the obligation would in strictness be dischargeable by payment of whatever French currency was legal tender for the amount of francs in question according to the law of France.

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(1) [1923] 2 Ch. 466, 473.

Now in the present case we have an Australian company agreeing to pay in London, if its creditor so desires, so many units of value which are the standard units both in Australia and here. If what I have been saying be well founded, the result would appear to be this. If it be a contract to pay Australian standard units, it will properly be discharged by payment of whatever is legal tender for the amount in Australian currency, though, as already pointed out, in practice it would be discharged in English currency forming legal tender for the equivalent sum at the ruling rate of exchange.

The answer to the question before the Court would therefore seem to depend upon the answer to the question of what is the meaning of the word " pounds " and the usual symbol for that word used in the contract between the parties.

The determination of that question is not, in my judgment, concluded in favour of the respondents to this appeal by saying that the proper law of the contract to pay in London is the law of England, for, though, as I have already pointed out, in a contract of which the proper law is English the word " pound " prima facie means an English pound, it does not do so necessarily. It is a question of construction.

Now there can be no question but that in the debentures the word " pound " and the symbol indicating that unit of value must, generally speaking, be intended to indicate the Australian unit. They are debentures issued by a company registered in Australia and carrying on business in that country whereby the principal moneys and interest thereby agreed to be paid are charged by way of floating charge upon assets that are principally, if not wholly, situated in that country. The holders are entitled to the benefit of and are subject to the provisions contained in a trust deed whereby Australian immovable property is vested in trustees resident in Australia upon the trusts usually found in such deeds. Both in the debentures and in that deed are contained provisions for the establishment of a cumulative sinking fund, in which provisions the unit of value is obviously the Australian pound. It is not indeed denied by the respondents that wherever in the debentures one finds an agreement to pay, whether as principal or interest, a certain number of pounds in Australia, the unit referred to is the Australian standard unit. They contend, however, that whenever the debenture holder exercises the option given to him of being paid at the branch office of the Commonwealth Bank of Australia in London the unit is to be the English one. The contention amounts to this, that in each coupon, to take one example, the symbol for the pound is to be given a different meaning according to whether the debenture holder elects to present it for payment in Australia or in London. This, in my judgment, is impossible. In those coupons the symbol can only mean one and the same thing wherever the coupon be cashed.

If we were dealing with a Canadian company in which the promises to pay were expressed in terms and symbols of dollars, there could be no difficulty, whatever might be the proper law of the contract; nor, as I have already pointed out, would there have been any difficulty had the symbol adopted for the standard unit of value in Australia been some new symbol, even if they had described that unit as a pound. In point of fact, as we know, they adopted the same symbol as is used to describe the English pound. But, for the reasons I have given, I have come to the conclusion that throughout this debenture both the word "pound" and the symbol refer to the Australian and not to the English pound.

In my judgment, the appeal should be allowed and a declaration made in the terms that have been read out by Lawrence L.J.

Appeal allowed.

Solicitors for all parties: *Blyth, Dutton, Hartley & Blyth.*

W. I. C.

JAY'S, LIMITED *v.* JACOBI.

EVE J.

1933

Feb. 2, 6.

[1932. J. 2393.]

Trade Name—Passing-off Action—Ladies' Costumiers Business—Adoption of similar Name by Defendant while employed by another Firm—New Business carried on under adopted Name—Distinction by word "Limited"—No Fraud or Risk of Confusion.

A person who has bona fide, and without any intention to deceive, adopted a name for business purposes and acquired it by reputation over a considerable period is entitled to trade under that name, and cannot be restrained from so doing, even though the similarity of the name to that of another firm engaged in business in the same trade may occasionally lead to confusion.

The defendant J., who had adopted and been known for some years while managing a ladies' costumiers business in Brighton as "Miss Jay," commenced a partnership business in the same trade under the name "Jays" in Hove. The plaintiffs, Jay's, Ld., an old-established firm of costumiers in Regent Street, London, sought to restrain the defendants from using the name "Jays," or any other name calculated to suggest that the business was that of the plaintiffs or a branch thereof, or that the goods sold by the defendants were supplied by the plaintiffs:—

Held, on the evidence that there was no passing-off proved, as the first defendant had acquired the name "Jay" by reputation and was entitled to trade under it, the names were not the same, the plaintiffs being a limited company with an apostrophe before the letter "s" in their name, and the businesses being of a different class there was no risk of any confusion between them. The action, therefore, failed.

Massam v. *Thorley's Cattle Food Co.* (1880) 14 Ch. D. 748 and *John Brinsmead & Sons, Ld.* v. *E. G. S. Brinsmead & Sons, Ld.* (1913) 30 R. P. C. 137, 493 applied.

ACTION.

The plaintiffs were a company carrying on a high-class and old-established business as ladies' costumiers in London, and had no branch elsewhere. The defendants were Mrs. Fay Jacobi and Miss Helena Limburg, carrying on a business opened in 1931, under the name "Jays," at No. 6 Church Road, Hove. The facts are fully stated in the judgment of the learned judge.

H. B. Vaisey K.C. and *J. V. Nesbitt* for the plaintiffs. The defendants are carrying on a ladies' costumiers business under the same name as the plaintiffs—"Jays," although neither of them is named Jay. The public will be induced to believe that the defendants' shop is a branch of the plaintiffs' London business, opened in a different style at Hove, and carrying on a cheaper class of business : *Ewing* v. *Buttercup Margarine Co., Ld.* (1) The name Jay may have been innocently adopted by the defendant Jacobi, but the Court has jurisdiction to restrain the use of the name if it is calculated to create confusion in the minds of customers between the two businesses, and in the circumstances the defendants ought to be restrained from trading under the name of "Jays." The defendant Jacobi has been known for some years as "Miss Jay," and there would be no objection to her trading as such.

Moritz K.C. and *K. E. Shelley* for the defendants. There is no evidence of confusion or lack of distinction between the plaintiffs' and the defendants' business. The two businesses cater for two different classes of trade, and the names, though similar, are not identical. The defendant Jacobi adopted the name of Jay for convenience in trading many years before she started in a business of her own, and she is entitled to continue trading under that name : *Joseph Rodgers & Sons, Ld.* v. *W. N. Rodgers & Co.* (2), per Romer J., referring to *Turton* v. *Turton* (3), per Cotton L.J.; *Jamieson & Co.* v. *Jamieson* (4) per Vaughan Williams L.J., where he said that there was no case in which it had been held that a man who happened to bear a particular name was debarred from entering into any trade he chose merely because there was some one else of the same name who had acquired a great reputation in the particular goods dealt with in that trade.

The mere fact that stupid or careless people may fall into error or confusion is not sufficient to entitle the plaintiffs to succeed.

Vaisey K.C. replied.

Cur. adv. vult.

Feb. 6. EVE J. The plaintiffs in this action, Jay's, Ld., claim an injunction to restrain the defendants, Mrs. Fay

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(1) [1917] 2 Ch. 1.

(2) (1924) 41 R. P. C. 277, 291.

(3) (1889) 42 Ch. D. 128, 143.

(4) (1898) 15 R. P. C. 169, 192.

Jacobi and Miss Elsie Helena Limburg, and each of them, from carrying on business under the name or style of "Jays" or under any other name or style calculated in any way to represent that the defendants' goods are the goods of the plaintiffs, or that the business carried on by the defendants is a branch of or connected with the business carried on by the plaintiffs.

The claim is an unequivocal challenge of the defendants' right to use the name "Jays." The material facts are not in dispute. The plaintiffs carry on in Regent Street, London, a large and high-class business as costumiers, dressmakers and furriers, and have done so for many years; they use the best of materials and have a very high reputation all over the Kingdom, and a "Jay's costume" or "a costume made by Jay's," means, in circles where such matters are discussed, a costume made by the plaintiffs. They have never had any branch establishment, either in or out of London, and they do not deal in cheap or inferior goods.

For fifteen years before the beginning of the year 1931 the first named defendant, Mrs. Fay Jacobi, was in the employ of a company known as "Lafayettes (Brighton), Ld.," and carrying on business as ladies' outfitters at three shops in Brighton. During that time she rose from the position of an assistant in one of the shops to that of manageress of all three shops. From her first engagement, and throughout the whole fifteen years, she was known to the staff, the customers, and all with whom she was brought into contact as an assistant, saleswoman, buyer and manageress, as Miss Jay. After her engagement had been terminated by the liquidation of Lafayettes she decided, early in 1931, to start in business on her own account, and in February notified this intention by circulating amongst those with whom she had been associated during her service with Lafayettes and others the exhibit F. J. 1. It reads as follows: "Miss Jay, late of Lafayettes, wishes to announce the opening of her new salon at 6 Church Road, Hove, where she cordially invites you to inspect without any necessity to purchase her range of exclusive yet inexpensive day and evening gowns, knitwear, coats, furs and chic millinery." She also advertised for a partner, arranged for such reconstruction of premises at No. 6 Church Road, Hove, as was necessary to adapt them for her business, including the provision of a suitable shop front, and on March 5 she and her co-defendant started to carry on business as costumiers and ladies' dressmakers and hatters in partnership under the name of "Jays."

In the statement of claim the plaintiffs allege that the carrying on of the business by the defendants under the name or style of "Jays" is "intended to lead members of the public to believe that the defendants' goods are the goods of the plaintiffs, and that such business is a branch of or connected with the plaintiffs' business"; but this allegation was not persisted in after Mr. John Haslett, a director of the plaintiff company since 1896, admitted in the box that he did not suggest that the name had been adopted for the purpose of filching the plaintiffs' goodwill, and agreed that the case should be dealt with on the footing that the defendants had throughout acted innocently.

The matter was in fact brought to the notice of the plaintiffs before the defendants commenced business, and on March 6 they were informed by the inquiry agents whom they had instructed that the shop would on completion be opened by Miss Jay, late of Lafayettes, as a costumier's. Acting under advice the plaintiffs decided not to take any action. I mention the incident, because in the letters of September 7, 1932, by which the first intimation was given to the defendants that the plaintiffs objected to the name under which the defendants were trading, it is inaccurately stated that the fact that the defendants were so trading had "just been brought to the plaintiffs' notice." They had known of it before March, 1931, as appears from the inquiry agents' report headed, "Jays—Miss Jay," and from Mr. Haslett's evidence. Nor is the next statement in the letters of September, that "certain persons have been led to believe that our clients were concerned in your business," been borne out by any evidence produced before me. The letters went on to request the defendants forthwith to cease the use of the plaintiffs' name; but the writer's request was surely founded on a misapprehension—the plaintiffs' name is not "Jays," but "Jay's, Limited," and the defendants were not in fact using that name.

The writ followed within a week, and now that the facts have been ascertained, and the suggestion of fraud withdrawn, it is quite clear that the plaintiffs are not entitled to an injunction in the terms asked for. Whether they are entitled to any relief at all depends upon the answer to the question whether the defendants have done anything calculated to produce the belief in the mind of a reasonable person that their business is the business of or connected with that of the plaintiffs.

Let me deal first with Mrs. Jacobi. In my opinion she has acquired the surname of "Jay" by reputation, and is entitled to carry on business under that name if she thinks fit. Authority for this is to be found in a passage in the judgment of Bramwell L.J. in *Massam* v. *Thorley's Cattle Food Co.* (1), where he is dealing with the argument advanced by the defendants that so long as the food was made and sold by a man named Thorley he could sell it in his own name as Thorley's Food, without qualification, notwithstanding that a preceding Thorley had carried on the business of making cattle food in such a way that by the name Thorley's Cattle Food the manufacture of that man was understood, the Lord Justice says: "I wish to make one observation about the use of the name '*Thorley's Food for Cattle.*' It has been said that the defendants have a right to say they make *Thorley's Food for Cattle* if they do not deceive. I agree that if they could use that expression without the risk of deceiving they ought to have a right to do so, but it seems to me almost impossible that they can. It is urged that it is hard upon them to forbid their using it, for that every Thorley has a right to make food, and therefore to sell it in his own name, and consequently, I suppose, to call it Thorley's Food. But not only has every Thorley a

(1) 14 Ch. D. 748, 760.

right to do that, but every John Doe has a right to do that because he may give himself the name of Thorley and carry on business under that name if he thinks fit." Now this is the point: "A surname is not a man's legal property, or conferred upon him by law in any particular way, it is gained by reputation, and if he choose to adopt the name of Thorley, and other people call him by that name, he is Thorley to all intents and purposes, although his name was originally John Doe."

So here this lady is quite entitled to acquire, as she has acquired by reputation, the name of Jay. The defendant, therefore, as the owner by reputation of the surname "Jay," has the right to trade under that name, and so long as she acts honestly she cannot be restrained from so doing, even though the similarity of such name to that of the plaintiffs may occasionally lead to confusion or to the goods of the one being mistaken for those of the other: see *Actiengesellschaft Hommel's Haematogen* v. *Hommel* (1); *John Brinsmead & Sons, Ld.* v. *Brinsmead.* (2)

What the plaintiffs are insisting upon is that the defendants cannot trade in the name they have adopted without creating confusion and misapprehension, and their pleading and the evidence they have produced is directed to establish that contention; but these drawbacks in a case where no dishonesty is established, and a fortiori in one where admittedly there is none, cannot prevail to restrain a defendant from carrying on his business in a name which he is entitled to use, so long as he does not use it in such a way as to represent that his goods are the goods of the plaintiff, or that his business is connected with that of the plaintiff.

There is not a line of evidence to suggest that the defendants have done either of these things. Apart from the use of the name—which differs from the plaintiffs' name in the important respects I have already alluded to—the absence of the apostrophe before the final letter and of the word

(1) (1912) 29 R. P. C. 378.
(2) 30 R. P. C. 137 and in C. A. 493, 505.

"Limited," no complaint is made of the get-up of the shop front or of the manner in which the goods are displayed and offered for sale; the script of the name as used upon the shop fascia and on all the defendants' stationery is of quite a different nature from that used by the plaintiffs. The first and last letters in the defendants' name "J" and "S" are much larger than the two middle letters "A" and "Y." In the plaintiffs' name block letters of the same size are used for the word "Jay's," and the word "Limited" is represented by the abbreviation "Ltd." in much smaller letters. The defendants have in all respects complied with the provisions of the Registration of Business Names Act, 1916, and in the stationery, invoices, and other documents on which their names as proprietors are required to be disclosed, they have disclosed them under the shortened letters "AY" in the middle of the name "Jays." These several matters are established by the exhibits marked J. U. D. 1, F. J. 2, F. J. 3, J. H. 1, and the enlarged picture on which the plaintiffs' premises are portrayed. I thought at one time that the plaintiffs might raise objection to the "s" which has been added to the name "Jay." Miss Jay explained that this addition was made because there were two partners interested in the business in equal shares, and they thought the plural more appropriate to these circumstances. But no point was made on this letter in the plaintiffs' evidence, and Mr. Haslett said they raised no objection to the name if spelt J-a-y-e-s, and, indeed, this was the alteration generally adopted by persons when the plaintiffs complained of their using "Jays." Phonetically there is no difference between J-a-y-s and J-a-y-e-s.

In my opinion the plaintiffs have wholly failed to prove any conduct on the part of the defendants calculated to lead to the belief that their business is in some way connected with the plaintiff company or that the goods they are making and selling are the goods of the plaintiffs. Even if confusion should arise from the use of the name under which the defendants are trading—which I am very much inclined to doubt—it is not due to any misconduct on the part of the

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defendants, and in the absence of such misconduct the plaintiffs are not entitled to any relief.

I doubt whether there is even a risk of any confusion. The two businesses cater for entirely distinct classes of customers; and as one of the trade witnesses said: "the two businesses are two different lines entirely. Jay's of Regent Street is a better end of goods; Jays of Hove is a cheaper end." But this is not all. Although this matter has been under the plaintiffs' notice for just on a couple of years, no one has been found to come forward at this trial and prove any instance of confusion, misapprehension, or mistake. In so saying I am not unmindful of the young lady who, ten days or a fortnight ago, from a bus passing along Church Road, caught a glimpse of the defendants' shop, which suggested to her that it might be Jay's of Regent Street.

The action is dismissed with costs.

Solicitors: *Lindus & Hortin; C. Butcher & Simon Burns.*

H. L. L.

In the Matter of AN APPLICATION FOR DISCHARGE OF A RESTRICTION AFFECTING 108 LANCASTER GATE

AND

In the Matter of SECTION 84 OF THE LAW OF PROPERTY ACT, 1925.

CLAUSON J.

1933

Feb. 14.

[1933. V. 5.]

Law of Property—Application to discharge a Restriction on the User of a House—Dismissal by the Official Arbitrator—No Right of Appeal to the Chancery Division by the Applicant—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 84, *sub-ss.* 1, 5—*R. S. C., Order* LIV.D, *rr.* 2, 3, 4.

Where an application under s. 84 of the Law of Property Act, 1925, for the discharge or modification of a restriction affecting the user of a house has been dismissed by the Official Arbitrator the applicant has no right of appeal to the Chancery Division under sub-s. 5 of the section.

Originating Motion.

This was an appeal from the dismissal by the Official Arbitrator as the Authority under s. 84 of the Law of Property Act, 1925, of an application for the discharge or modification of the restriction to which a freehold dwelling-house, No. 108 Lancaster Gate, Paddington, in the county of London, was subject under a conveyance of the said property.

By an instrument of transfer dated November 29, 1923, Sir John Herbert Vernon transferred to the Right Hon. Algernon Viscount Massereene (inter alia) a freehold messuage No. 108 Lancaster Gate in the parish of Paddington in the county of London subject to the following restriction: The purchaser his heirs or assigns will not at any time hereafter use or occupy, or suffer to be used or occupied, any messuage or buildings for the time being erected on the land abutting on Lancaster Gate comprised in this conveyance otherwise than as and for a private dwelling-house only. It was provided that the above restriction should not be modified or discharged under s. 84 of the Land Transfer Act, 1875, or otherwise, without the consent of the said Sir John Herbert Vernon his heirs or assigns.

By divers mesne assignments and finally by a transfer dated October 10, 1928, and made between Constance Chapman of the one part and Harold Mario Mitchell Acton and William Hamilton Mitchell Acton of the other part, the house became vested in the Messrs. Acton in fee simple subject to the said restriction.

Various negotiations took place between Messrs. Acton and Sir John Herbert Vernon with regard to the total or partial discharge of the said restriction, but Sir John Herbert Vernon refused to allow the restriction to be discharged or modified.

On February 17, 1932, Messrs. Acton applied to Mr. Hugh C. Webster, the Official Arbitrator selected by the Reference Committee pursuant to s. 84 of the Law of Property Act, 1925, that the restriction imposed by the transfer of November 29, 1923, might be modified to the extent of permitting the said house to be used as and for (1.) a private dwelling-house, or (2.) a private hotel, or (3.) residential flats, or (4.) as and for a social club.

The application was opposed by Sir John Herbert Vernon and was heard by the Official Arbitrator on November 17, 1932, when evidence was called by both sides. On December 14, 1932, the Official Arbitrator gave his decision in the following terms: "I, being the Official Arbitrator selected by the Reference Committee to hear and determine the above application, having heard the same, hereby order that the application be, and the same is hereby, dismissed."

Messrs. Acton appealed against this decision by a notice of motion to Clauson J., the judge nominated to hear such a motion by the Lord Chancellor pursuant to Order LIV.D, rr. 2 and 4, of the Rules of the Supreme Court.

Sect. 84 of the Law of Property Act, 1925, is, so far as is material to this case, in these terms:—

(1.) "The Authority hereinafter defined shall (without prejudice to any concurrent jurisdiction of the court) have power from time to time, on the application of any person interested in any freehold land affected by any restriction, arising under covenant or otherwise as to the user thereof or the building thereon, by order wholly or partially to discharge or modify any such restriction (subject or not to the payment by the applicant of compensation to any person suffering loss in consequence of the order) on being satisfied :—

(*a*) that by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which the Authority may deem material, the restriction ought to be deemed obsolete, or that the continued existence thereof would impede the reasonable user of the land for public or private purposes without securing practical benefits to other persons, or, as the case may be, would unless modified so impede such user ; or . . . .

(*c*) that the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction.

(4.) The Reference Committee mentioned in this section may make rules in relation to any applications to be made to the Authority under this section, and with the consent of the Treasury may prescribe the fees to be paid in connexion with any application to the Authority.

(5.) Any order made under this section shall be binding on all persons, whether ascertained or of full age or capacity or not, then entitled or thereafter capable of becoming entitled to the benefit of any restriction, which is thereby discharged, modified, or dealt with, and whether such persons are parties to the proceedings or . . . . not, but any order made by the Authority shall, in accordance with rules of court, be subject to appeal to the court.

(10.) In this section ' the Authority ' means such one or more of the Official Arbitrators appointed for the purposes of the Acquisition of Land (Assessment of Compensation) Act, 1919, as may be selected by the Reference Committee under that Act."

By the Law of Property (Restrictive Covenants Discharge and Modification) Rules, 1925, the Reference Committee made certain rules as to the manner in which applications under s. 84 should be made, and as to the fees payable. By r. 2 of Order LIV.D of the Rules of the Supreme Court (which rule applies to the Law of Property Act, 1922): "Every appeal from the Minister under that Act shall be instituted in the Chancery Division of the High Court of Justice by originating notice of motion, and shall be heard and determined by a single judge nominated from time to time either generally or in any particular instance by the Lord Chancellor."

Rule 4 is: "Rule 2 of this Order shall apply *mutatis mutandis* to any appeal from an order or decision of the Authority or the Minister under s. 84 of the Law of Property Act, 1925."

Manning K.C. and *F. J. Tucker* for the applicants.

Gavin Simonds K.C. and *Russell Vick* for Sir John Herbert Vernon.

Gavin Simonds K.C. took the preliminary objection that the Court had no jurisdiction under s. 84 of the Law of Property Act, 1925, to hear an appeal against the dismissal of an application. There is nothing in s. 84 to give the right of appeal to the Court in the case of a refusal by the Authority to discharge or modify the restrictions. The right of appeal is given only when the Authority has discharged or modified the restrictions. In that case the legal right of the person imposing the restrictions has been interfered with and he can come to the Court to protect his rights. But if the Authority in his discretion has refused to discharge or modify there is nothing in the section to give the Court the power to overrule his discretion and itself to discharge or modify. The power of the Court is limited to the conditions imposed by the section. It is difficult to find any authority to govern the case, but there is a somewhat analogous decision, *Baron Reitzes de Marienwert* v. *Administrator of Austrian Property* (1), where under the Treaty of Peace with Austria the Administrator had power to confiscate the property of Austrian nationals. The Administrator having decided that he was not satisfied that the plaintiff, formerly a national of

(1) [1924] 2 Ch. 282, 292, 307.

the Austrian Empire, had acquired another nationality, both Tomlin J. and the Court of Appeal held that the Court could not go behind his decision and investigate the question of nationality.

In any case the Court can only act under the conditions of s. 84, and I submit that they give no right of appeal in this case. No order has in fact been made from which there is an appeal. Though the expression "order" is used in the decision of the Authority, it is not in effect an "order" from which a right to appeal is given.

Manning K.C. and *F. J. Tucker.* Mr. Simonds is trying to put too narrow a construction upon the right to appeal. Under s. 84 the Authority has power to make three kinds of order: (1.) He can discharge or modify the restrictions; (2.) he can decide upon any compensation to be paid; or (3.) he can dismiss the application. There is a right to appeal to the Court from any of these orders. Mr. Webster states that he is making an order, and why is that not an order on which to found the jurisdiction of the Court? The right of appeal is for the benefit of all parties to the application. The intention of the Legislature was that all parties should have the right of appeal, and there is no limitation of that right.

CLAUSON J. This is an appeal under s. 84 of the Law of Property Act, 1925, from the Authority defined in that section. Under sub-s. 5 of that section: "Any order made by the Authority shall, in accordance with rules of court, be subject to appeal to the court." Having regard to the provisions of Order LIV.D of the Rules of the Supreme Court every appeal under this section comes to the Chancery Division of the High Court of Justice, and is to be heard and determined by a single judge nominated by the Lord Chancellor, and I am the judge so nominated, and in that way the appeal comes before me.

The appeal is from an order made by Mr. Webster, the Authority referred to in the section. The order is in these terms: "I, being the Official Arbitrator selected by the

Reference Committee to hear and determine the above application" (I will state later what the application is), "having heard the same order that the application be, and the same is hereby, dismissed."

The preliminary objection has been taken that there is no appeal to me under the section from the order which I have just read.

Before reading the section it will be convenient to state sufficient of the facts for it to be appreciated how the matter arises. There is a house, No. 108 Lancaster Gate, which is subject to certain restrictions restraining its user. The present owners of the house desire the restrictions to be discharged or modified. A previous owner of the house who, upon a sale to a predecessor in title of the present owner, imposed the restrictions, objects to the restrictions being discharged or modified. Mr. Webster, having heard a considerable amount of evidence, and having heard the parties at length, did not see his way to interfere with the operation of the restrictions.

Sub-s. 1 of s. 84 refers to the concurrent jurisdiction of this Court. It might be well that I should explain in a sentence what the concurrent jurisdiction of this Court is. This Court, being a Court of Equity, has a limited power, where the person entitled to enforce certain restrictions in regard to the user of land seeks to enforce them by action, to refuse to interfere and enforce them, if it is satisfied (I am putting this in general and possibly not quite accurate terms) that the restrictions have become obsolete. That jurisdiction of the Court is one of a limited kind, the exercise of which has given rise to a good deal of difficulty and uncertainty. [His Lordship then read sub-s. 1 of s. 84, except the proviso as to compensation, and continued :] Sub-s. 2 is not material for this purpose. Sub-s. 3 gives the Authority a direction that, before making an order under this section he shall direct such inquiry to be made of any local authority, and such notices (if any), whether by way of advertisement or otherwise, to be given to persons interested as the Authority may think fit. Sub-s. 4 has reference to the rules governing applications to the Authority. [His Lordship then read sub-s. 5, and continued :] I think that it is common ground that there is nothing in the later sub-sections of this section which throws any light on the problem which I have to determine.

Is the order which Mr. Webster made in this case, "that the application be, and the same is hereby dismissed," an order made by the Authority within sub-s. 5? Some light is thrown upon sub-s. 5 by sub-s. 1, which shows that the order made by the Authority, which is referred to in sub-s. 5, must be an order wholly or partially discharging or modifying a restriction. The order made by Mr. Webster does not wholly or partially discharge or modify any restriction. The truth is, I venture to think, that, although in form (and the form is convenient and desirable in order that there should be no misunderstanding) Mr. Webster has made an order, what he has really done is to say : "I do not think fit to make any order." In my view, on the construction of the section there is no right of appeal against a refusal to make an order ; there is only a right to appeal against such order as the Authority makes. While I come to that conclusion on the wording of the section, I may add that, if there were any ambiguity in the matter (which I do not myself think there is), there are certain considerations which point to this being the proper construction of the section.

First, it is clear, from the provisions relating to the selection of the gentleman who is to constitute the Authority, that the tribunal set up is intended to have a personal and expert knowledge of the various matters material in dealing with such a problem as is set. Then the power is framed in terms which show that the Authority's right to interfere with restrictions is, in a wide sense, discretionary. If the Authority does not think fit to make an order, no one's rights are interfered with, every one is left as he was before. The Authority has not interfered. On the other hand, if the Authority does make an order discharging or modifying restrictions, it is obvious that a serious inroad has been

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LANCASTER GATE, PADDINGTON, AND LAW OF PROPERTY ACT, 1925, s. 84 (APPLICATION FOR DISCHARGE OF RESTRICTION), *In the Matter of.*

made upon the normal rights of those who are entitled to enforce the restrictions. One would expect that, if the Authority discharges or modifies restrictions, some right of appeal should be reserved, so that the Court should have in the last resort a control over the action of the Authority in derogating from the normal legal rights of those concerned in the matter. As I construe the section, that is exactly what the section does. If the Authority interferes with legal rights, there is an appeal. The Court then can go into the matter and satisfy itself that the interference with legal rights, effected by the order of the Authority, is one for which there are proper grounds. I can find nothing in the section to suggest that it is intended that, if the Authority with his knowledge and experience chooses to leave matters as they stand, there is to be a discretion in the Court itself to take up the matter and to interfere with the legal rights of the parties. One would not have expected that that would be the position, and in my view that is not the position. Accordingly, while I reach my conclusion purely upon the construction of the section, I feel that the other considerations to which I have referred suggest that there may well have been reasons for the section being framed in somewhat narrow terms.

The result is that I hold that the action of the Official Arbitrator, in refusing to make an order discharging or modifying the restrictions to which objection has been made, a refusal which he has definitely embodied in a statement that he dismisses the application to him, is not action of such a nature as to give rise to a right of appeal.

Accordingly, I must give effect to the preliminary objection, and I dismiss the motion by way of appeal with costs.

Solicitors: *Vandercom, Stanton & Co.; Woodbridge & Sons.*

E. K. C.

BALDEN *v.* SHORTER.

MAUGHAM J.

1933

Jan. 18.

[1932. B. 1344.]

Injurious Falsehood without Defamation—Malice essential to Cause of Action—No Malice.

An action for injurious falsehood does not lie without proof of actual malice in the sense of a wrongful intention to injure the plaintiff.

A statement false in fact, and detrimental to the plaintiff's business though not defamatory, will therefore not support such an action if it was made in the belief, even a careless belief, that it was true, and without any indirect motive of hostility to the plaintiff.

Greers, Ld. v. *Pearman & Corder, Ld.* (1922) 39 R. P. C. 406 followed.

WITNESS ACTION.

The plaintiff had been employed as traveller and salesman by a company for about four years and, after the liquidation of the company, by the receiver for the debenture holders for about two months, afterwards obtaining like employment elsewhere. While with the company he had obtained a considerable number of orders and earned a large commission. A Mr. Bensted had also been employed by the company and, after its liquidation, by the receiver for about ten days. The defendants bought the goodwill of the company's business, which they carried on on their own premises, and bought also the right to use a trade name, being the company's name without the word "limited." Mr. Bensted, who had heard that the plaintiff was contemplating employment elsewhere but did not know whether he had obtained it, as in fact he had, was employed by the defendants on the premises where they were carrying on the company's business which they had acquired. A customer who had long had dealings with the plaintiff and had been accustomed to buy in complete reliance on him gave an order to Mr. Bensted, who, in answer to the customer's inquiry, stated that the plaintiff was not in at the moment, but was employed by the defendants and would receive the commission on the customer's order. The plaintiff, who was not and never had been employed by the defendants, alleged in this action that Mr. Bensted's statement had been made to induce the giving of the order, and claimed an injunction restraining the defendants, their servants, employees and agents from representing that he was employed by or otherwise connected with the business carried on by them under the name of the company without the addition of the word "limited." The defendants denied that Mr. Bensted made the statement with their authority or as their agent or to induce the giving of the order, and Mr. Bensted stated in evidence that he made the statement believing it to be true.

C. E. Harman for the plaintiff. This action is of a kind unusual in the Chancery Division. It is in the nature of an action for a variety of defamation which is described in Salmond on Torts, 7th ed., pp. 580 et seq., as "injurious falsehood." The learned author there says ". . . . The wrong of deceit consists, ... in false statements made to the plaintiff himself whereby he is induced to act to his own loss. The wrong of injurious falsehood, on the other hand, consists in false statements made to other persons concerning the plaintiff whereby he suffers loss through the action of those others. . . . It may be stated as a general rule that it is an actionable wrong maliciously to make a false statement respecting any person with the result that other persons deceived thereby are induced to act in a manner which causes loss to him. . . . Both in defamation and in injurious falsehood the defendant is liable because he has made a false and hurtful statement respecting the plaintiff; but in one case the statement is an attack upon his reputation, and in the other it is not. A statement which injures the plaintiff in his reputation is governed by the very stringent rules of libel and slander, but a statement which injures him only by misleading other persons into action that is detrimental to him falls within the more lenient rule of liability which we are now considering": see *Ratcliffe* v. *Evans*. (1) The word "maliciously," used with reference to such a case as the present, means "with an indirect object," i.e., in the present case, with the object of benefiting Mr. Bensted or his employers. See also *Riding* v. *Smith* (1), in which much the same kind of statement was made; Salmond on Torts, 7th ed., p. 583, where the learned author says: " . . . . it is now apparently settled that malice in the law of slander of title and other forms of injurious falsehood means some dishonest or otherwise improper motive . . . ."; and *British Railway Traffic and Electric Co.* v. *The C. R. C. Co. and the London County Council.* (2)

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(1) [1892] 2 Q. B. 524.

Humphrey H. King for the defendants. The action must stand or fall on the allegation of "injurious falsehood" which is correctly defined in Salmond on Torts, 7th ed., pp. 580 et seq. But the statements made by Mr. Bensted do not come within that definition. He fully believed that the plaintiff was employed by the defendants. The representation was made innocently and with full belief in its truth, not in order to secure any benefit for Mr. Bensted or the defendants. The present case is a case of damnum absque injuria: see *Day* v. *Brownrigg.* (3) It cannot possibly be necessary or incidental to a salesman's duty to disclose to customers how commission paid on sales to them will be applied. A statement made honestly and with a full belief in its truth cannot be a ground for an action of this kind.

Harman in reply. The defendant's case is based on the bona fides of Mr. Bensted, who must have known that the plaintiff was not employed by them.

MAUGHAM J. [after stating the facts :] If I could properly conclude that the story told in the witness box by Mr. Bensted was untrue and that he knew that the plaintiff was not employed by the defendants, I should have little difficulty in determining the action in the plaintiff's favour because, if Mr. Bensted said that knowing it to be untrue, I should draw the inference that he did it from a dishonest motive and maliciously. But I cannot come to that conclusion.

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(1) (1876) 1 Ex. D. 91.

(2) [1922] 2 K. B. 260, 267.

(3) (1878) 10 Ch. D. 294.

I think that he made a careless mistake, and that it was likely that he had originally heard that the plaintiff was contemplating taking new employment but had not heard that he had definitely obtained it and had concluded that, having been one of the company's most important travellers, he had been employed by the defendants. I am not prepared to conclude that Mr. Bensted was telling a lie when he said in the witness box that he had made a mistake in thinking that the plaintiff was employed by the defendants. He did make the statements alleged but made them, at the worst, carelessly; and the only question to be determined is whether that amounts to malice.

The meaning of "malice" in connection with injurious falsehood is dealt with in Salmond on Torts, 7th ed., pp. 582–583, in the following passage, which I accept as correct: "What is meant by malice in this connection? Lord Davey, in the passage already cited"—from *Royal Baking Powder Co.* v. *Wright, Crossley & Co.* (1)—"defines it as meaning the absence of just cause or excuse. It is to be observed, however, that this is not one of the recognised meanings of the term malice in other connections. An act done without just cause or excuse is wrongful but not necessarily malicious; for example, a trespass by mistake on another man's land, or the conversion of his chattels under an erroneous claim of right. Notwithstanding Lord Davey's dictum, it is now apparently settled that malice in the law of slander of title and other forms of injurious falsehood means some dishonest or otherwise improper motive. A *bona fide* assertion of title, however mistaken, if made for the protection of one's own interest or for some other proper purpose, is not malicious." In *Greers, Ld.* v. *Pearman & Corder, Ld.* (2), Bankes L.J. said that "maliciously" for the purpose which the Court was considering meant "with some indirect object," and Scrutton L.J. remarked that the only question in the case was whether there was evidence on which the jury could find that the statements were made maliciously "in the sense of being made with some indirect or dishonest motive."

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(1) (1900) 18 R. P. C. 95, 99.

(2) 39 R. P. C. 406, 417.

I think that in the present case the statements were, at the worst, careless statements made without any indirect motive and without any intention of injuring the plaintiff, and I find that Mr. Bensted believed them to be true. The allegation of malice must fail, and on that finding of fact the action must be dismissed.

Solicitors: *Sharpe, Pritchard & Co.; Woodroffes.*

K. R. A. H.

In re WALPOLE.

PUBLIC TRUSTEE *v.* CANTERBURY.

[1932. W. 2793.]

FARWELL J.
1932
Dec. 14, 15.

Will—Codicil—Trust for Accumulations of Income—Accumulations of Income and Cash and Investments representing Accumulations of the Income void and undisposed of after the expiration of Twenty-one Years from Death of Testatrix—Destination of undisposed Accumulations and Cash and Investments derived from Real Estate—Next of Kin—Heir at Law.

By a codicil to her will, a testatrix left three-fourths of her residuary estate, subject to certain payments, upon trust to apply the income for the benefit, maintenance and support of her daughter, who was of unsound mind, and during the lifetime of her daughter to accumulate all the residue not applied under the discretionary trust by way of compound interest by investing the surplus income and the resulting income thereof in certain investments and for certain purposes mentioned in the codicil. The testatrix died in 1901, and in 1922, twenty-one years after her death, the trusts for accumulations determined, and as from that date they were held to be undisposed of.

The question then arose whether: (1.) the undisposed income and accumulations derived from the income of the residuary real estate; and (2.) the income and accumulations derived from the income of accumulations of income of the real estate were divisible among the next of kin of the testatrix, or whether they went to the representative of her heir at law, who died in 1931:—

Held, that the personal representative of the heir at law of the testatrix was entitled to (1.) and (2.).

Eyre v. *Marsden* (1838) 2 Keen, 564 followed.

ADJOURNED SUMMONS.

By her will, dated June 27, 1895, the testatrix, after appointing executors and trustees, gave various legacies. She gave to her daughter, the defendant Lady Canterbury, her villa residence in France and various jewels and chattels absolutely, and certain silver plate for her life. Then she devised the whole of her residuary real and personal estate to her trustees upon trust to sell and convert the same into money and to hold the proceeds, as to one equal fourth part for her son, Lord Orford, if living at her death, and as to the remaining three-fourths in trust for Lady Canterbury absolutely, but if Lord Orford should die in her lifetime, then her trustees were to hold the whole of the residuary estate in trust for Lady Canterbury absolutely. Then she exercised various powers of appointment, and those she appointed as to one-third in favour of Lord Orford, and as to two-thirds in favour of Lady Canterbury. Lady Canterbury having become of unsound mind, the testatrix made a codicil, dated March 15, 1897. By that codicil she left many of the dispositions in favour of Lady Canterbury untouched. With regard to the residuary estate, she recited the dispositions in the will, and proceeded: "Now I hereby revoke the said gifts to my said daughter of the said three equal fourth parts of the said residuary monies and of the remaining one-fourth contingent on the death of my son . . . . in my lifetime, and direct my said trustees to stand possessed of the said three equal fourth parts of the said residuary monies and also of the remaining one-fourth should my son . . . . die in my lifetime in trust to pay the following legacies," and there followed a list of legacies. Then the codicil proceeded: "And I direct that my trustees shall stand possessed of the balance remaining after payment of the legacies given by this codicil of the said three equal fourth parts of the said residuary monies or of the whole residuary monies should my son . . . . die in my lifetime upon trust to invest the same . . . . and to hold such investments in trust during my daughter's lifetime to pay or apply the income arising therefrom as follows: In the first place to pay to my said daughter an annual sum of 100*l*. . . . . in performance and full satisfaction of a covenant on the part of my late husband and myself to pay to my said daughter an annual sum of 100*l*. contained in the settlement made on my daughter's marriage, and in the next place to pay to my grandson, the Honourable Henry Frederick Manners Sutton, during his mother's lifetime an annual sum of 400*l*.," reducible to 200*l*. in certain circumstances. The codicil then proceeded: "I direct my trustees (subject to paying or providing for the said annuity of 100*l*. and the said annuity of 400*l*. or 200*l*. as the case may be) to apply the said income or such part of the said income as they in their uncontrolled discretion may think fit for the benefit, maintenance and support of my said daughter and generally to arrange and provide for the support and comfort of my said daughter as they shall in their uncontrolled discretion think fit, and shall during the life of my daughter from time to time accumulate all the residue not applied under the discretionary trust or power lastly hereinbefore contained of the same and income or the whole income if no part thereof shall be so applied in the way of compound interest by investing the same and the resulting income thereof in or upon such investments as are hereinbefore mentioned, and I declare that all such accumulations shall be added to the capital of the trust premises from the income whereof the same shall so have proceeded in augmentation thereof and so as to form an accretion thereto and be inseparably blended therewith, provided always and I hereby direct and declare that if my said daughter shall recover and become capable of managing her own affairs my trustees shall, subject as aforesaid, pay the said income and the income of such accumulations (if any) to my said daughter during her life and after the death of my said daughter I direct that my trustees shall pay the said income and the income of such accumulations (if any) to my said grandson . . . . during his life." The testatrix died on January 19, 1901, and Lord Orford, her heir at law, died on September 27, 1931. Lady Canterbury was still alive, but was still under a disability. The trust for accumulations necessarily determined at the expiration of twenty-one years from the death of the testatrix—namely, on January 19, 1922.

Under these circumstances this summons was taken out by the trustee of the will and codicil of the testatrix, and the first question raised was whether Lady Canterbury was absolutely entitled to: (*a*) the income of three-fourths of the residuary real and personal estate of the testatrix arising after the expiration of twenty-one years from her death until the death or previous recovery of Lady Canterbury so far as that income was not applied upon the trusts for the benefit of Lady Canterbury and otherwise declared concerning the same by the codicil, and the cash and investments representing accumulations of the income so arising; (*b*) the income arising after the expiration of the twenty-one years until the death or previous recovery of Lady Canterbury (so far as not applied as above mentioned) of accumulations of the income of the three-fourths made up to the death or previous recovery of Lady Canterbury and the cash and investments representing accumulations of the income so arising, or whether they or any and which of them were undisposed of. His Lordship held that they were all undisposed of. The question then arose whether, the income and accumulations being undisposed of, they were wholly divisible among the next of kin of the testatrix according to the Statute of Distributions or whether the personal representative of her heir at law was entitled to: (*a*) the income and accumulations so far as representing or derived from the income of her residuary real estate; (*b*) the income and accumulations so far as representing or derived from the income of accumulations of income of her residuary real estate.

Eardley-Wilmot for plaintiff.

C. E. E. Jenkins K.C. and *P. M. Walters* for Lady Canterbury. The accumulations after the expiration of twenty-one years being undisposed of, they are divisible among the next of kin. It is true that in Jarman on Wills, 7th ed., p. 366, it is stated that: "The accumulations of rents and profits seem to preserve their character of realty, so that the heir is entitled to such accumulations," and *Eyre* v. *Marsden* (1) is cited in support of that proposition.

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(1) 2 Keen, 564.

In Gray on the Rule against Perpetuities, 3rd ed., p. 545, para. 706, the exact point is very clearly dealt with, and grave doubts are thrown on the decision in *Eyre* v. *Marsden.* (1) It is there stated that the accumulations of the income of realty (unless ordered to be invested in realty) would seem, in spite of their origin, to be personalty, and their income must therefore go to the residuary legatees or next of kin. That statement is evidently a well considered one and is to be preferred to the decision in *Eyre* v. *Marsden* (1), where the point was not considered very thoroughly, it being only one of several in that case. Again, in Tudor on Charities, 5th ed., p. 434, it is stated that: "Arrears of rent could always be bequeathed to charity, for 'rent when due is in the nature of fallen fruit, it is severed from the land'": see *Edwards* v. *Hall* (2) and *Thomas* v. *Howell.* (3) To produce the income the realty had to be converted into personalty in pursuance of the trusts, and the part not converted must be taken as having been converted.

Daynes K.C. and *R. F. Roxburgh* for the representative of Clare Horatio Walpole, one of the next of kin of the testatrix. The heir at law is not entitled to the accumulations. The rule in *Ackroyd* v. *Smithson* (4) cannot apply in this case. There is no other case in accord with *Eyre* v. *Marsden* (1) on this point. Here we are dealing with something that is personalty by its own inherent nature. This was a perfectly lawful trust to collect rents; these were £ *s. d.* and were invested in personalty. There is nothing in *Ackroyd* v. *Smithson* (4) or in any other case to convert them into anything else, and they go to the next of kin.

[They also cited *Green* v. *Gascoyne* (5) and *In re Richerson.* (6)]

Vaisey K.C. and *H. S. G. Buckmaster* for the representative of the heir at law of the testatrix. The heir at law is entitled to all the accumulations. If it were all real estate there could be no question that the heir at law would take all the rents and any accumulation of rents not used for the purposes of the will. *Ackroyd* v. *Smithson* (1) says that conversion is not to prejudice the heir at law to the benefit of the next of kin. There is nothing in *In re Richerson* (2), or any other case, to show that conversion would deprive the heir at law of his rights. This case is entirely covered by *Eyre* v. *Marsden.* (3)

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(1) 2 Keen, 564.
(2) (1855) 6 De G. M. & G. 74, 94.
(3) (1874) L. R. 18 Eq. 198, 203.
(4) (1780) 1 Bro. C. C. 503.
(5) (1865) 4 De G. J. & S. 565.
(6) [1892] 1 Ch. 379.

FARWELL J. The question which I now have to decide is as to the destination of the income produced by the accumulations so far as the accumulations represent income of what was converted real estate or unconverted real estate. There is no doubt, of course, that as from the expiration of the twenty-one years when the trust for accumulation determined, there is an intestacy, and the heir at law is entitled to any income which is produced from either the real estate itself or the proceeds of sale of the real estate until the death of Lady Canterbury, when the intestacy will come to an end. The question which I have to determine is: who is entitled to the income of the accumulations, those accumulations being accumulated income of the real estate or of the proceeds of sale of the real estate? It is said, on the one hand, that the heir at law is entitled to the produce of those investments, which represent, as I have said, the accumulated rents and profits of the real estate. On the other hand, it is said that they are personalty and must be treated for all purposes as personalty and go to the next of kin.

The trust for conversion contained in the will was undoubtedly a valid trust, and the property, so far as all the persons who take under the will are concerned, whether actually sold or not, must be treated as having been validly converted and as being personal estate. Moreover, during the period of twenty-one years from the death of the testatrix, the accumulations were properly made and properly added to capital. As from the expiration of the twenty-one years, the trust for accumulations comes to an end by virtue of law, and the income can no longer be accumulated ; it must be disposed of, and, there being no effective dispositions by the will, it must go to the persons who are entitled as on an intestacy. But the trust for conversion being one which is perfectly valid and effective for all purposes as among the persons who are interested under the will, the question I have to determine is how far, if at all, it affects the interests of the heir at law, as between himself and the next of kin of the testatrix. In the case of a total intestacy the whole will is inoperative and there is no conversion, and the heir takes the real estate and the next of kin take the personal estate ; but if there is only a partial intestacy, as in this case, and the trust for conversion is a valid trust, it undoubtedly affects the position of the heir to this extent : that although it does not defeat his right as heir at law to whatever is real estate undisposed of, for the purpose of the devolution of his estate it is treated as personalty and will pass as such. I think that is quite plainly established by the decision of Chitty J. in *In re Richerson.* (1) So far as the persons who claim through the heir on an intestacy of the heir are concerned, the property is personalty and not realty, because the trust for conversion has affected the position to that extent even as against the heir; but, except to that extent, as between the heir of the testator or testatrix and the next of kin of the testator or testatrix, in my judgment the trusts of the will do not affect their respective rights in so much of the property as is undisposed of.

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(1) (1780) 1 Bro. C. C. 503.

(2) [1892] 1 Ch. 379.

(3) 2 Keen, 564.

If that be the true view, what are the respective rights of the heir at law and the next of kin in the income produced by the accumulations of the rents and profits of the real estate made during the period in which they were lawfully made ? The accumulations represent the income of real estate subject to a trust for conversion, but real estate so far as the right of the heir was concerned as against the next of kin. They represent the fruit of that real estate properly accumulated, but none the less something which belonged to the heir at law except in so far as he was effectively ousted by the trusts of the will. If there had been no trust for accumulation, but an intestacy as from the death of the testatrix, for a limited period, the heir at law beyond all doubt would have been entitled to the rents and profits or the income of the proceeds of sale of the real estate; he did not receive them, in fact, because under an effective trust to accumulate they were accumulated for twenty-one years, but at the end of that period the trust to accumulate terminated. What has been accumulated is property which to some extent represents the heir's property, except in so far as he has been ousted. I cannot see myself that there is anything in the trust to accumulate which can have the effect of preventing the heir—although he is not entitled to the actual rents and profits of the real estate, because they have been properly accumulated and added to the capital—from claiming that whatever those accumulations produce, so far as it is not disposed of by the will, as between himself and the next of kin is his property. It is said on behalf of the next of kin that rents, when they are once received and in the hands of the trustees, are personalty, and personalty for all purposes, but in my judgment, if it be true to say that the heir's rights are only ousted so far as is necessary to give effect to the valid dispositions of the testator, then the fact that in the hands of the trustees the rents and profits may be personalty cannot affect the right of the heir to claim that if the produce of those rents and profits is not disposed of by the will he is entitled to them. That seems to me, apart from authority, to be the true view of this matter, but in my judgment the case is covered by the decision in *Eyre* v. *Marsden*. (1) It is said that in that case this question of the income of accumulations was never argued. I am not at all satisfied that that is so, but in any event the decree which is set out in terms in the judgment, not as something appended to the end of the report as a

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(1) [1892] 1 Ch. 379.

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(1) 2 Keen, 564.

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note but as part of the learned Master of the Rolls' judgment, seems to me to be precisely in point and to decide this question. That being so, both on the authority of that case and for the reasons which I have expressed above, I hold that the income of the accumulations so far as they represent the accumulations of the income of the real estate belong and go to the personal representatives of the heir at law and not to the next of kin.

Solicitors: *Dawson & Co.*; *Burch & Co.*

P. J. B.

ADMINISTRATOR OF GERMAN PROPERTY *v.* KNOOP.

[1931. G. 604.]

MAUGHAM J.

1932

Nov. 21, 22, 23; Dec. 19

Alien—Enemy Property—Will proved in 1871—*Trustees in Great Britain—Beneficiaries German Nationals in Germany after War—Trust Funds under Will—Administrator of German Property—Treaty of Peace with Germany, Part X.—Treaty of Peace Order*, 1919, *Article* 1 (*xvi.*) (*xvii.*), *paras.* (*ccc*) (*cccc*)—*Treaty of Peace* (*Amendment*) *Order*, 1920—*Treaty of Peace* (*Amendment*) (*No.* 2) *Order*, 1920—*Treaty of Peace Order* (*Amendment*) *Order*, 1924—*Treaties of Peace Orders* (*Amendment*) *Order*, 1932.

The Administrator of German Property brought in 1931 an action; for a declaration that moneys in the United Kingdom in the hands of the trustees of a will proved in 1871 were subject to the charge created by Article 1 (xvi.) of the Treaty of Peace Order, 1919, and the Amendment Orders, 1920 to 1924. The defendants to the action were the trustees and the three children, all German nationals, of a daughter of the testator who had married a German national in 1877 and had remained a German national until her death in 1927:—

Held, following the decisions in *In re Schiff* [1921] 1 Ch. 149 and *Josef Inwald Aktiengesellschaft* v. *Pfeiffer* (1928) 44 Times L. R. 352, that as the result of the Treaty of Peace with Germany, the Treaty of Peace Act, 1919, and the Treaty of Peace Order, 1919, the property of German nationals which was in the United Kingdom at the date of the coming into force of the treaty was taken from them, and can be returned to them only by a conveyance or transfer.

In the agreement dated December 28, 1929, between the British and German Governments as to the liquidation of German properties, and the agreement concluded with Germany at the Hague Conference, both ratified in May, 1930, there is nothing to show that the German Government was thereby expressly or by necessary implication purporting to act as agent or trustee on behalf of its nationals so as to give its nationals a right of action.

Rustomjee v. *The Queen* (1876) 1 Q. B. D. 487; 2 Q. B. D. 69; and *Civilian War Claimants Association* v. *The King* [1932] A. C. 14 followed.

WITNESS ACTION.

The daughter of a testator who died and whose will was proved in 1871 married a German national in 1877 and remained a German national until her death in 1927. She left three children, who were German nationals and were the last three defendants to this action, the first three being the trustees of the will, who were resident in Great Britain. After the War her interest and the interests of the last three defendants in the testator's estate became subject to the Treaty of Peace with Germany, including the charge provided by Part X. thereof. On December 28, 1929, an agreement (hereinafter called " the London Agreement ") was concluded between the British and German Governments in regard to the liquidation of German properties. Another agreement (hereinafter called " the Hague Agreement ") with Germany, concluded at the Hague Conference, provided for the definite settlement of the German Government's reparations liabilities, for the constitution of the Bank for International Settlements as proposed in the Young Plan, and for other matters. Both agreements were ratified in May, 1930.

By Article 297 of the Treaty of Peace, the Allied and Associated Powers reserved the right to liquidate property within their territories, colonies, possessions and protectorates belonging to German nationals at the date of the coming into force of the treaty. It was provided also that the liquidation should be carried out in accordance with the laws of the Allied or Associated State concerned; that the German owner should not be able to dispose of the property, rights or interests or subject them to a charge without that State's consent; that any property, rights or interests or proceeds thereof, or cash assets not used as provided by the article, might be retained by the Allied or Associated

Power concerned, and that, if they were retained, their cash value should be dealt with as provided by Article 243 of the treaty, which stated the nature of the amounts and balances which were to be reckoned as credits to Germany in respect of her reparation obligations. By Article 297 Germany also undertook to compensate her nationals in respect of the sale or retention of their property, rights or interests in Allied or Associated States.

By Article 1 (xvi.) of the Treaty of Peace Order, 1919, as amended by the Treaty of Peace (Amendment) Order, 1920, and the Treaty of Peace Order (Amendment) Order, 1924, all property, rights and interests within His Majesty's Dominions or Protectorates belonging to German nationals at the date of the coming into force of the treaty (not being property, rights or interests acquired under any general licence issued on behalf of His Majesty), and the net proceeds of their sale or liquidation or of other dealings with them, were charged with payment of amounts, among others, due in respect of claims by British nationals with regard to their property, rights and interests in German territory, compensation awarded by the Mixed Arbitral Tribunal or an arbitrator appointed by it, and claims growing out of acts committed by the German Government or German authorities since July 31, 1914, and before August 4, 1914. Finally the sub-section provided that property, rights or interests so charged might at any time be released from the charge by the Administrator, acting under the general direction of the Board of Trade. Article 1 (xvii.), para. (*ccc*), as amended by the Treaty of Peace (Amendment) (No. 2) Order, 1920, and the Treaty of Peace Order (Amendment) Order, 1924, provided that where the property, right or interest subject to the charge consisted of any sum of money due to a German national (not being an enemy debt within the meaning of Article 296 of the Treaty), it should be payable to the Administrator of German Property and be paid to him on demand; and para. (*cccc*) as so amended provided that a certificate by the Administrator that any property, right or interest was subject to the charge should be sufficient evidence of the facts stated in the certificate, and that, where the demand was accompanied by the certificate, the person by whom any sum of money was due should comply with the demand and should not be liable to any action or other legal proceeding in respect of the compliance, but that if it should be subsequently proved that the property, right or interest was not subject to the charge the owner should be entitled to recover it from the Administrator.

Among the articles of the London Agreement were :—

Article 1. " The Government of the United Kingdom will, subject to the provisions and stipulations contained in the following articles, release and where necessary re-transfer to the original German owners, or to the persons deriving through them, the property rights and interests originally belonging to them and now subject to the charge created in pursuance of the Treaty of Versailles in so far as such property rights and interests shall not be already liquid or liquidated or finally disposed of, on the date on which this Agreement comes into force."

Article 2. " There shall be no abrogation or modification of the right to seize, retain and liquidate or charge German property rights and interests but the release of the property rights and interests affected by this Agreement shall be effected by the Government of the United Kingdom handing over or transferring to the original owner (which expression shall wherever used in this Agreement include the person or persons deriving title through him) the particular property right or interest concerned in each case. In any case of doubt or difficulty as to who is entitled the Government of the United Kingdom may demand a warranty of title by the German Government and withhold release of the property until the German Government have undertaken fully to indemnify them against any claim in respect thereof."

Article 4. "Any particular property, right or interest may be excluded if the original owner shall in writing address a request to this effect to the Administrator of German Property in the United Kingdom. Such request must be made prior to the release of the said property, right or interest. In such case, if the said property, right or interest would, but for such request, have been released under the terms of this Agreement, the net proceeds thereof if subsequently realised by the Administrator shall be paid over to the original owner or his representatives."

Article 5. "Property rights and interests which at the date on which this Agreement comes into force have been sold or realised, or are the subject-matter of an Agreement for sale or realisation entered into by the Administrator of German Property in the United Kingdom (which expression shall wherever used in this Agreement include the Custodian in the United Kingdom or other official charged with the administration of ex-enemy property) or of a judgment in legal proceedings given in favour of the Administrator of German Property in the United Kingdom are included in the above-mentioned expression 'liquid or liquidated or finally disposed of.'"

Article 10. "The Government of the United Kingdom will, as from the date on which this Agreement comes into force, permit German nationals, the owners of rights of industrial, literary or artistic property in respect of which licences have been granted under the special measures taken during the war or in respect of which there have been licences or assignments subject to the conditions imposed in pursuance of Article 1 (XX.) of the Treaty of Peace Order, 1919, as amended, to have the full benefit of those rights without prejudice, however, to the rights of any existing licensees or assignees under the said licences or assignments and will take all necessary steps to give effect to the foregoing, and will not impose after the date on which this Agreement comes into force any further limitation, condition or restrictions in respect of the said Article 1 (XX.) or Article 306 (5) (6) and (7) of the Treaty of Versailles subject only to the exercise of the right of the Government of the United Kingdom to impose such limitations, conditions or restrictions as may be considered necessary for national defence or in the public interest. Any indemnities or royalties that may arise under paragraph (6) of Article 306 in the event of the application of the provisions of the preceding paragraph shall be paid to the German nationals entitled thereto and no longer dealt with as provided in paragraph (6)." [These provisions of the Treaty of Peace, and of the Treaty of Peace Order, 1919, as amended, referred to the imposition, on rights of industrial, literary or artistic property acquired by German nationals before or during the War, of limitations, conditions, and restrictions.]

Article 14. " The present Agreement shall be a final settlement of all questions and claims relating to the retention and liquidation of German property, rights and interests, or the proceeds thereof, in the United Kingdom of Great Britain and Northern Ireland, or in the territory of any British Colony or Protectorate or any Mandated area administered by the Government of the United Kingdom which became subject to exceptional war measures and/or to the rights of retention, liquidation and charge pursuant to the provisions of the Treaty of Versailles. The proceeds of liquidation of German property rights and interests not released under the present Agreement or otherwise and not already credited shall be credited as heretofore by the Clearing Office in the United Kingdom to the German Clearing Office."

Among the articles of the Hague Agreement were :—

Article I. " The Experts' Plan of the 7th June, 1929, together with this present Agreement and the Protocol of the 31st August, 1929 (all of which are hereinafter described as the New Plan) is definitely accepted as a complete and final settlement, so far as Germany is concerned, of the financial questions resulting from the War. By their acceptance the Signatory Powers undertake the obligations and acquire the rights resulting for them respectively from the New Plan.

The German Government gives the Creditor Powers the solemn undertaking to pay the annuities for which the New Plan provides in accordance with the stipulations contained therein."

Article II. "As from the date when the New Plan is put into execution as provided in the final clause of this present Agreement, Germany's previous obligation is entirely replaced, except in respect of the German External Loan 1924, by the obligation laid down in the New Plan. The payment in full of the annuities there mentioned, in so far as the same are due to the Creditor Powers, is accepted by those Powers as a final discharge of all the liabilities of Germany still remaining undischarged, referred to in Section XI. of Part I. of the Dawes Plan as interpreted by the decisions of the Interpretation Tribunal set up under the London Agreement of the 30th August, 1924."

Article III. A. "The signatory Governments recognise that the accounts between the Reparation Commission and Germany relating to transactions prior to the period of the Dawes Plan, together with all accounts involving credits to Germany, either now or in the future, against the original capital debt are henceforth obsolete and without practical effect and declare them closed in their present condition."

B. (*a*) "In execution of paragraph 143 of the Experts' Report of the 7th June, 1929, on the understanding that the following declaration is to be considered as a full compliance with the requirements of that paragraph as to a waiver, Germany declares that she waives every claim as defined by the following list, whether for a payment or for property, which she may have addressed or might hereafter address to the Reparation Commission or to any Creditor Power signatory of the present Agreement for any transaction prior in date to the signature of this Agreement, connected with the World War, the Armistice Conventions, the Treaty of Versailles, or any agreements made for their execution :—"

(1) "claims relating to property or pecuniary rights of prisoners of war in so far as they have not already been settled by special agreements ;"

(2) "claims seeking to obtain the reimbursement of payments made under paragraph 11 of the Annex to Article 296 of the Treaty of Versailles ;" [by that paragraph : "The balance between the Clearing

Offices shall be struck monthly and the credit balance paid in cash by the debtor State within a week. Nevertheless, any credit balances which may be due by one or more of the Allied and Associated Powers shall be retained until complete payment shall have been effected of the sums due to the Allied or Associated Powers or their nationals on account of the war."]

(3) "claims relating to loans issued by the former German Colonies;"

(4) "any claims, whether for a payment or for property, which the German Government has presented or might present for its own account other than State claims notified, under the clearing procedure provided for under Articles 296 and 72 of the Treaty of Versailles, by the Creditor to the Debtor Office."

(*b*) "By way of reciprocity the Creditor Powers accept in conformity with the recommendation of paragraph 96 of the Experts' Report of the 7th June, 1929, the payment in full of the annuities fixed thereby as a final discharge of all the liabilities of Germany still remaining undischarged and waive every claim additional to those annuities, either for a payment or for property, which has been addressed or might be addressed to Germany for any past transaction falling under the same heads of claim as those appearing under (1) to (4) above."

(*c*) "The provisions of the present Article do not effect the execution of agreements later in date than the 10th January, 1920, for the abandonment of the liquidation of German private property, rights or interests or the restitution either of those properties, rights or interests or the proceeds of their liquidation."

C. (*a*) "The Creditor Governments undertake, as from the date of the acceptance of the Experts' Report of the 7th June, 1929, to make no further use of their right to seize, retain and liquidate the property, rights and interests of German nationals or companies controlled by them, in so far as not already liquid or liquidated or finally disposed of,

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including the rights of the signatory Creditor Powers under Article 306, paragraphs (5), (6) and (7), of the Treaty of Versailles."

(*b*) "The execution of this undertaking will be regulated by special agreements between the German Government and each of the Governments concerned."

(*c*) "The Signatory Governments will use every effort to clear up definitely all outstanding questions relating to the execution of this undertaking within one year after the coming into force of the New Plan."

(*d*) "This undertaking has no application in cases where special settlements have already been made."

D. "All or some of the questions mentioned in the present Article as to the waiver of claims and the cessation of liquidation are governed, as between the German Government on the one hand and the following Governments respectively on the other hand, by the Agreements concluded on the following dates, that is to say: Belgium, 13th July, 1929, and 16th January, 1930; Great Britain, 28th December, 1929; Canada, 14th January, 1930; Commonwealth of Australia, 17th January 1930; New Zealand, 17th January, 1930; France, 31st December, 1929; Italy, 20th January, 1930; Poland, 31st October, 1929."

In this action, the writ in which was issued on March 7, 1931, the plaintiff, the Administrator of German Property, claimed (inter alia) a declaration that certain sums of money, in the hands of the first three defendants as trustees of the testator's will and mentioned in a certificate under the plaintiff's hand dated November 14, 1930, and addressed to those defendants, were subject to the charge created by Article 1 (xvi.) of the Treaty of Peace Order and the Amendment Orders, 1919 to 1924, and payment of those sums by them; and he asked that the last three defendants might be appointed to represent their mother's estate for purposes of the action. The trustees counterclaimed for a declaration that in so far as the sums were subject to the charge they fell to be released pursuant to the London Agreement, and for release of them. The last three defendants submitted to be bound by the order of the Court. The question for decision was whether the last three defendants could base on the London Agreement a claim that the sums should be paid to them.

The Attorney-General (*Sir Thomas Inskip K.C.*), *Gavin T. Simonds K.C.*, and *J. H. Stamp* for the plaintiff. The plaintiff desires a declaration that the sums of money, subject to any costs, charges, expenses or other claim which can properly be set forth or maintained by the trustees, are payable to him. A subpœna was served on the plaintiff to produce the accounts. It is quite impossible to settle the question by producing the accounts, and it is not in the public interest that they should be produced. It is taking a quite unprecedented course to demand their production in order, in the present case, to satisfy the Court that some part of the fund as to which the charge exists is still unpaid. There is no controversy at all as to the funds or their amount, nature, or liability to be charged. The whole dispute arises out of the London Agreement. The defence and counterclaim raise the question which was discussed and decided in *Civilian War Claimants Association* v. *The King* (1), following *Rustomjee* v. *The Queen.* (2) The Court has no jurisdiction to interpret the London Agreement or to decide any question arising under it. The words upon which the answer to the question will depend are "liquid or liquidated or finally disposed of": the Court ought to decline to interpret those words, and ought to say that the London Agreement cannot be made the subject of a claim or subject to the enforcement of any rights by a person in the position of the defendants in this action. Unless a Government makes an agreement as trustee for its nationals, its nationals cannot rely upon an agreement which is simply made between two Governments, however much the agreement may enure to their benefit, if the Government in question chooses to use the fund for their benefit. That is

(1) [1932] A. C. 14.

(2) 1 Q. B. D. 487; 2 Q. B. D. 69.

really the only point that arises upon the pleadings. The charge is created by statute and it has been decided more than once that the whole of the property subject to the charge is expropriated. It is not a conditional charge: the property is necessarily expropriated. It ceases to be the property of the persons who, apart from the charge, would be entitled to it, and it has been decided by Russell J. (as he then was) in *In re Schiff* (1) and by the House of Lords in *Josef Inwald Aktiengesellschaft* v. *Pfeiffer* (2) that the word "charge" really is not to be understood in the ordinary sense in which we understand it as a charge, but means a right to retain and liquidate, without any right of redemption on the part of the person who owned the property, because the balance goes elsewhere. The London Agreement, never having been made part of the municipal law of this realm, is not a matter upon which any of His Majesty's subjects can rely: *Civilian War Claimants Association* v. *The King* (3) If there is any complaint as to the way in which that agreement has been applied, observed, or not observed, it is a matter to be dealt with in Parliament, or by complaint addressed to the responsible Minister of the Crown. It is not a ground for such a defence and counterclaim as are pleaded in this action as an answer to the claim for a declaration that the payment over of the moneys is pursuant to the right to retain and liquidate the sums in question. There is no answer, in law, to the plaintiff's claim.

Roland Burrows K.C. and *Arthur Jaffé* for the defendants. The plaintiff's right cannot be anything more than to succeed to the right of Mrs. Evelyn Knoop—namely, to call upon the trustees to account and to pay over such moneys as may be due on the account. The defendants ask for leave to amend their pleadings by alleging that if, contrary to the defendants' contention, the interests were subject to the charge, they have ceased to be so because, first, the charge mentioned in Article 1 (xvi.) of the Treaty of Peace Order, 1919, has been fully satisfied, and, secondly, the fund created

(1) [1921] 1 Ch. 149.

(2) 44 Times L. R. 352.

(3) [1932] A. C. 14.

by Article 243 of the Treaty of Versailles has been closed and is no longer in existence. After this action had been fixed for trial, there was passed, for the purposes of this action, the Treaties of Peace Orders (Amendment) Order, 1932, which purported to add another charge. By Article 1 of that Order: "The Treaty of Peace Order, 1919, as amended, shall have effect and be deemed always to have had effect as if after Article I. (XVII.) (*f*)" (dealing with the Administrator's power to charge fees in respect of his duties) "there were inserted the following further sub-paragraph:—(*g*) In the construction of this paragraph the liability of the Property, Rights and Interests mentioned in Article I. (XVI.) hereof to be retained by the United Kingdom of Great Britain and Northern Ireland, pursuant to Article 297 of the Treaty, shall be deemed to be a charge thereon and to form part of the charge created by Article I. (XVI.) hereof." That Order is inoperative, because there is nothing to which it can relate. Legislation passed during the War suspended the rights of enemy nationals but did not take them away: *Stevenson (Hugh) & Sons* v. *Aktiengesellschaft für Cartonnagen-Industrie.* (1) Although there was no substantial economic advantage, a title was left in the enemy nationals. In the application of the Treaty of Peace and in the adoption of it and making it law in this country, a Clearing Office was set up and the Administrator was appointed. He is given a charge and is directed to realize the property for two specific purposes which, in the present case, have been satisfied. But those are the only purposes for which he is to act and operate. Article 243 has entirely ceased to exist. Reparations have ceased to exist and have been replaced by terminable annuities which have nothing whatever to do with the Treaty of Peace. Thus, as the purposes for which the Administrator exists have been satisfied, they have come to an end, and there is now no charge to which the provisions of the Treaties of Peace Orders (Amendment) Order, 1932, can apply. The result is that the defendants' rights revive. The matter must be put in that way, because, under the Treaty of Peace and the legislation under it, the only thing left in the defendants was a bare title.

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(1) [1918] A. C. 239.

[MAUGHAM J. Is not the root of all this the suggestion that the defendants had a quasi right of redemption in this property?]

Not a right of redemption: they have a bare title, in which, however, a really substantial element remains. But there are two decisions against that contention—namely, *In re Schiff* (1) and *Josef Inwald Aktiengesellschaft* v. *Pfeiffer.* (2) The latter is a decision that under the Treaty of Peace the powers of the creditor with regard to a debt were exercisable by the Administrator alone. But the question before the Court was whether an enemy creditor could take proceedings in the case of a debt, and the decision was that he could not, and that he could not fetter the Administrator's discretion as to whether he should or should not take steps to collect the debt. That is away from the point in issue in the present case. The evidence of a German expert shows that by German law the agreement of 1929 is part of the law of Germany. Thus, German nationals have secured such rights as are conferred on them by the agreement, and either the agreement gives them a release from the charge, so that the title remains in them, or else it gives them a grant of the property which, but for the treaty, would have been theirs all the time. In considering cases of this kind it is competent for the Court to look at and consider international law even though the convention in question has, as in the present case, not been ratified: *Porter* v. *Freudenberg.* (3) It is clear that the German Government entered into the agreement of 1929 as agent and trustee for the defendants and other German nationals in the position of the defendants as principals. The Court is competent to inquire into the construction of treaties and other Acts of State: *Walker* v. *Baird.* (4) The Court can look at and give effect to any treaty which does not offend against the law of the land or require it to be altered: *Fenton Textile*

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(1) [1921] 1 Ch. 149.
(2) 44 Times L. R. 352.
(3) [1915] 1 K. B. 857.
(4) [1892] A. C. 491.

Association, Ld. v. *Krassin and Others.* (1) The statutes of this country are enacted by the Sovereign, who cannot be taken to be enacting anything which conflicts with his duty: *Re Arrow River and Tributaries Slide and Boom Co., Ld.* (2) If it becomes impossible for a servant of the Crown to carry out something which is permissive under an Act of Parliament or an Order in Council, the Act or the Order is by implication repealed: *Rex* v. *Secretary of State for Home Affairs.* (3) The answer to the plaintiff's contention is conclusive, and the defendants are entitled to judgment.

The Attorney-General in reply.

MAUGHAM J. [after stating the facts:] I will summarize my view of the treaty in the words used by Russell J. (as he then was) in *In re Schiff.* (4) The learned judge said: "The result is that the property in this country, belonging to a German national at the date when the Treaty comes into force, is charged, and is to be sold, the proceeds of sale will never reach the German national, the result will be that in lieu of the property of the German national there will be substituted for it a claim by the German national against his own country for compensation." Then, after stating certain provisions of the Treaty of Peace Act, 1919, and referring to the Treaty of Peace Order of the same year with some elaboration, the learned judge made the statement—with which, if I may say so with respect, I wholly agree—"As a result of those provisions, which are statutory, it appears to me that a German national in respect of property which he owned in this country at the date of the coming into operation of the Treaty of Peace had that property taken from him in every sense of the word. It was taken from him in the sense that it was charged, it was to be sold, the proceeds were to be applied, first of all in payment of the various matters specified in the Treaty and any ultimate balance there might be on the general Clearing Office fund was to go as a credit to Germany and his right would be that, in lieu of having the property which he had at the date when the Peace Treaty came into operation, he would have substituted therefor a right to claim compensation against his own Government." It is, I think, unnecessary for me further to state the judgment of the learned judge, except perhaps to repeat that I fully agree with the reasons which led him to that conclusion. I am not aware that anybody has doubted the correctness of that decision, and I would add that a very similar case went before the Court of Appeal, and the House of Lords, in *Josef Inwald Aktiengesellschaft* v. *Pfeiffer.* (1) It is true that the sum involved there was a liquidated debt due by a Norwegian subject to the plaintiff company, an Austrian company, before the outbreak of war, and the question which was involved was whether the plaintiff company could sue the defendant for the amount. The judge in Chambers made an order striking out the claim: the Court of Appeal affirmed the order; the decision of the Court of Appeal was affirmed by the House of Lords, and in the speech of Lord Sumner, as briefly reported (2), I find that the learned Lord is taking in substance the same view of the treaty as was taken by Russell J. in *In re Schiff.* (3) He referred to Article 249 of the Peace Treaty, and Article 1 (x.) (*ee*) of the Order in Council. Then he said that "he did not see how it could be seriously contended that, if the Administrator had the debt placed by law in such a position that he had all the powers of the creditor, any one else could sue as creditor. Nor was that difficulty got over by joining the Administrator"—that means the Administrator of Austrian Property—"as a defendant. It was said that all that was given to the Administrator was a charge, and a charge for a particular purpose, and that it followed, therefore, that if and when all the payments for which the charge was imposed had been made, the interest of the Administrator ceased and that the title of the original owner was not divested, but remained, subject to the charge," and then he says that that argument appealed to Scrutton L.J., and continues: "He" (Lord Sumner) "thought that the answer of the Master of the Rolls to that argument was satisfactory. It was not to be taken that any doctrine corresponding to the mortgagor's equity of redemption was contemplated by the framers of the Treaty. It was not reasonable to suppose that the peculiarly English doctrine of the legal and equitable estate and the rights arising therefrom was in the minds of the parties. He had no hesitation in saying that the position of the appellants was such that they could not bring this action at all. . . . ." I take that decision in the House of Lords, not as being confined merely to a liquidated debt, but as being a decision relating to the true construction of the treaty. I may add perhaps that it would be very extraordinary if the English doctrine of equity of redemption was to be found in such a treaty, because it is well known to most people who have ever had anything to do with French or other Continental laws that those laws do not contain any such doctrine as that of trusts or anything resembling the English doctrine of equity of redemption. At any rate, apart from that, I accept the decision as being a decision relating to the true construction of the treaty as a whole, and as showing that by the treaty coupled with the Treaty of Peace Act, 1919, the property of German nationals which was in the United Kingdom at the date of the coming into force of the treaty was taken away from them for all purposes, and that to get the property back into the German nationals something of the nature of a conveyance or transfer would be required.

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(1) (1921) 38 Times L. R. 259.

(2) (1931) 66 Ontario Law Reports, 577; (1931) 2 Dominion Law Reports, 216.

(3) [1923] 2 K. B. 361.

(4) [1921] 1 Ch. 149, 156, 157.

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(1) (1927) 43 Times L. R. 399; 44 Times L. R. 352.

(2) 44 Times L. R. 352, 353.

(3) [1921] 1 Ch. 149.

The next document which I am asked by the defendants to look at and to consider is the London Agreement. It was ratified on May 6, 1930, when there was also ratified the so-called Hague Agreement, which provided for the definite settlement of the reparation liabilities of the German Government, for the constitution of the Bank for International Settlement as proposed in the Young Plan, and for certain other matters. The agreements, taken together, represented what was thought to be a general liquidation of the financial questions raised by the War and the subsequent

Treaties of Peace. They have all to be considered, if it is desired to appreciate their true purport and intention, as if they were executed on the same day and related to the same general subject-matter. I will treat myself as having read the whole of the London Agreement and the Hague Agreement, and particularly as having paid great attention, as I have been asked to, to Articles 1, 2, 4, 5, 10 and 14 of the London Agreement, and Articles 1, 2 and 3 of the Hague Agreement. The London Agreement, ratified, as I have said, on May 8, 1930, has been made the subject of a German statute which became law in March, 1930, and therefore, according to the evidence given by a learned German lawyer, Dr. Fritz Ernst Oppenheimer, the agreement in question, so far as it confers rights on the Germans, is a part of the German law. On the other hand, it has not been, so far as related to anything with which this Court is concerned, the subject of an English statute, and the agreement is, therefore, not one on which reliance can be placed in this Court as justifying a property claim. But it is said that if you attentively read the agreement you will come to the conclusion, not that it was entered into by the British Government on behalf of German nationals who had property in this country, but that it was entered into by the German Government on behalf of those nationals in the sense that the German Government was either a trustee or an agent for German nationals who were intended to have benefits under Articles 1 and 2 of the London Agreement. There again, it seems to me, I have the authority of the House of Lords in a case which is so nearly equivalent to the present that, for my part, I do not see any possibility of distinguishing it. The decision in question is *Civilian War Claimants Association* v. *The King.* (1) It may be added that in the course of the judgments there is the most pointed approval given to *Rustomjee* v. *The Queen.* (2) The general principle laid down by very eminent judges in that case, and approved in the House of Lords by Lord Buckmaster, Lord Warrington,

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(1) [1932] A. C. 14.

(2) 1 Q. B. D. 487; 2 Q. B. D. 69.

Lord Atkin, Lord Tomlin and Lord Macmillan, is this, that (except perhaps in a very few exceptional cases) the relation of trustee or agent which is alleged to subsist between a Sovereign Power and the subjects of that Sovereign Power in the negotiation and conclusion of a treaty is one which cannot exist in any State like ours and, I may add, in any State like that which now exists in Germany. The speeches all show that, whether or not a duty arises when certain benefits accrue under the treaty to a particular Sovereign Power to distribute that money or to apply it in a particular way, yet the Sovereign cannot be taken as negotiating or as acting as agent for the nationals of its own State. That is indeed inconsistent with the position that exists in such a State as ours. In *Rustomjee* v. *The Queen* (1) the treaty was made between Great Britain and China, and a sum representing three million dollars was paid to the British Government on account of the debts that were due to British subjects from the Chinese merchants. Yet it was held that the British subjects had no right whatever to petition the Crown by petition of right to obtain payment of any part of that sum which Great Britain had received. It is true, as counsel for the defendants has pointed out, that Lord Atkin, in his observations on the case in the House of Lords, observed that the Crown may choose expressly to declare that it was acting as agent, and in that case there would be an exception. Clearly there would be, but I have been quite unable to find anything which can amount to a statement that Germany was acting as agent here for the German nationals in question. I may perhaps observe for myself that if one Sovereign Power enters into an agreement or treaty with another on the terms that the former agrees to release or to transfer to the nationals of the latter valuable rights, while the latter agrees to make payments of value to the former, there would seem to be the strongest possible ground for not laying hold of expressions here and there for the purpose of arriving at the conclusion that, whether or not the one Sovereign Power complies with its obligations, the other Sovereign Power is bound to pay to the nationals of that other Sovereign Power the sums which are mentioned or referred to. However that may be, I cannot find in any of these agreements, and particularly in the London Agreement, anything to show that the German Government was expressly or by necessary implication purporting to act on behalf of its nationals, and the ingenious criticisms of the terms of the agreement which have been addressed to me ought, when considered from the true aspect that ought to be brought to bear on such an agreement, to be brushed aside. Accordingly, in my opinion, the plaintiff here, as Administrator of German Property, is entitled to receive the sums of money subject to any proper defences which may be raised by the trustees in relation to the proper administration of the trusts. In regard to that, if they have any costs, charges and expenses incurred before November 14, 1930, I have no doubt they would be entitled to deduct them.

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(1) 1 Q. B. D. 487; 2 Q. B. D. 69.

As regards the counterclaim of the first three defendants, I am of opinion that those defendants are not entitled to rely on or enforce the provisions of the agreement and, accordingly, there will be no case for directing at their suit any sort of account for the purpose of determining the amounts in respect of the so-called charge created by the Treaty of Versailles.

I have already stated the general terms of the declaration to which I think the plaintiff is entitled and which, in substance, is only this, that he will be entitled to claim payment of the four sums of money from the first three defendants, subject to any costs, charges and expenses properly due to them, or any other claims in respect of the administration of the property, other than any acts done after November 14, 1930, the date of the certificate under the hand of the plaintiff.

Dec. 19. The action was again before the Court, and it was sought to argue on behalf of the defendants that costs ought not to be awarded to the Crown. On behalf of the plaintiff it was pointed out that in cases of this kind it had always been the practice to award costs for or against the Administrator, as in ordinary actions. Accordingly costs were awarded for the Administrator.

Solicitors: *Solicitor to the Clearing Office; Dehn & Lauderdale, for Tatham, Worthington & Co., Manchester.*

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C. A.
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Jan. 11.

In re MATTHEW ELLIS, LIMITED.

[No. 00479 of 1932.]

Company—Winding-up—Insolvency—Debenture issued within Six Months of Winding-up—Arrangement as to Application of Part of Moneys advanced —Payment of past Debt for Goods supplied by Firm of which Lender was a Partner—" Except to the amount of any cash paid to the company "— Validity of Floating Charge—Companies Act, 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *s.* 266.

Early in 1932 a company which was in financial difficulty and insolvent obtained a loan from its chairman, who was also a partner in a firm which supplied the bulk of its stock of goods to the company. He thought that an advance might save the company, but before making any advance ascertained from his partners that they would only consent to continue to supply the company with goods on credit if the past debt to the firm of 1954*l.* was paid. He therefore advanced to the company 3000*l.* on the security of a third debenture, dated March 24, 1932, after arranging with the company that out of this sum 1954*l.* should be applied in paying the past debt to the firm. In July, 1932, a compulsory order for the winding-up of the company was made:—

Held (reversing the decision of Eve J.), that the sum of 1954*l.* out of the total sum of 3000*l.* was " cash paid to the company at the time of .... the creation of, and in consideration for, the charge " within s. 266 of the Companies Act, 1929, and that there was, therefore, a valid floating charge in respect of the whole sum of 3000*l.*

In re Orleans Motor Co. [1911] 2 Ch. 41 distinguished.

Dictum of Astbury J. in *In re Hayman, Christy & Lilly, Ld.* [1917] 1 Ch. 283, 285, by which he construed the expression in the section then corresponding to s. 266 of the Companies Act, 1929, " except to the amount of any cash paid to the company " as meaning " except to the amount of any cash absolutely and unconditionally paid to the company," disapproved.

SUMMONS IN WINDING-UP.

The summons was taken out by the liquidator asking for a declaration that the payment of a sum of 1954*l.* 4*s.* made by the company in liquidation to a firm of Arthur Tipper & Co., of Victoria Foundry, Willenhall, on or about March 29, 1932, was an undue and fraudulent preference of the respondents over the other creditors of the company under s. 265 of the Companies Act, 1929, and invalid accordingly, and for an order for payment of the said sum to the liquidator, and alternatively a declaration that the floating charge contained in a debenture for 3000*l.* and interest dated March 24, 1932, and created by the company and issued to the respondent A. D. Tipper, was invalid under s. 266 of the Companies Act, 1929, to the said amount of 1954*l.* 4*s.* and the interest thereon.

The company was incorporated in the year 1911 with a capital of 5000*l.* divided into 1000 shares of 5*l.* each in order to carry on the business of key maker, factor and locksmith's agent formerly carried on at 35 Green Street, Bethnal Green, by Matthew Ellis Turnbull under the style of Matthew Ellis. The paid-up capital of the company was 3600*l.* in 720 fully paid shares of 5*l.* each, of which 676 were at all material times held by Arthur David Tipper, and the remaining 44 at all such times by J. E. Turnbull. Before 1931 the company had created and issued debentures for a total amount of 4800*l.*, of which 3000*l.* was still outstanding, held by the Midland Bank, Ld., the company's bankers. Until March, 1931, Matthew Ellis Turnbull was a life director of and also held a controlling share or interest in the company. At a meeting of the company on March 5, 1931, M. E. Turnbull resigned his office of life director and was elected an ordinary director, and the respondent, A. D. Tipper, was elected a director, and at the same time acquired a controlling share interest from M. E. Turnbull. On March 19, 1931, the company created and issued to A. D. Tipper a second debenture for 2000*l.* and interest at 7½ per cent. per annum containing a floating charge on the undertaking. In September, 1931, Matthew Ellis Turnbull resigned his office as director of the company, and thereafter until the date of liquidation the sole directors of the company were A. D. Tipper and J. E. Turnbull.

A. D. Tipper was a partner in the firm of Arthur Tipper, of which the company was one of the customers. Between June 1, 1931, and March 1, 1932, Messrs. Arthur Tipper supplied goods to the company to the amount of 2386*l.* 11*s.* 10*d.* and received payments on account of 432*l.* 7*s.* 10*d.*, leaving due at the end of February, 1932, a sum of 1954*l.* 4*s.* In addition, down to March 24, 1932, the firm supplied to the company goods to the value of 236*l.* 1*s.* on the usual terms of one month's credit.

Shortly before March 24, 1932, A. D. Tipper informed his firm that the company would need further assistance. The other members of the firm pointed out to him that the moneys due to Arthur Tipper ought to be paid out of the first moneys to be provided by him, and that if the company wished Arthur Tipper to continue to supply goods on credit, it would be necessary for the company to pay for the goods supplied by the firm down to date. It was then arranged between the partners that if A. D. Tipper advanced 3000*l.* on debenture to the company the amount of 1954*l.* 4*s.* due to Arthur Tipper down to the end of February, 1932, should be paid, and that if it was so paid the firm would continue to supply goods on credit to the company.

At the end of March, 1932, according to the evidence of A. D. Tipper, the position of the company was difficult, but not as he thought desperate, and he was confident that if further money were provided it would overcome its difficulties. Accordingly it was arranged that A. D. Tipper should advance 3000*l.* to the company on the security of a debenture, that out of that amount the sum of 1954*l.* 4*s.* due to Arthur Tipper should be paid off, leaving about 1050*l.* in the hands of the company, out of which 750*l.* was paid to the Midland Bank in reduction of the company's loan account, on the understanding that if it was required the bank would again advance the amount on the security of A. D. Tipper's guarantees. These arrangements were carried out at a board meeting on March 24, 1932.

According to the evidence of J. E. Turnbull the firm of Arthur Tipper were the principal suppliers of goods to the company, and at the material time were the only firm to which the company could safely look for the supply of goods for the purposes of its business on the usual credit terms.

By an order made on July 11, 1932, on a creditor's petition, the company was ordered to be wound up compulsorily, and on August 15, 1932, the applicant, W. A. J. Osborne, was appointed liquidator in place of the Official Receiver.

J. G. Strangman for the liquidator. On the authorities the issue of the debenture to A. D. Tipper was invalid. The money must come free from any condition into the hands of the company, and there must be no incumbrance on it: per Parker J. in *In re Orleans Motor Co.* (1) and Astbury J. in *In re Hayman, Christy & Lilly, Ld.* (2)

I rely on several grounds as to the debenture. It was clear that 1954*l.* did not come into the company's hands free from obligation, but to clear off an existing debt. The money advanced, to come within the exception "except as to cash," etc., must go to swell the assets of the company and become available for all its creditors. The statement of the Master of the Rolls in Ireland in *In re Macleave & Co.* (3) that the money was paid to diminish the company's liability and not to increase its assets, as applied to this case, shows that this was a fraudulent preference.

[*In re Olderfleet Shipbuilding Co.* (4) was also referred to.]

Lionel Cohen K.C. and *J. A. Reid* for the respondent. On the facts the payment of 1954*l.* to Arthur Tipper & Co. was not a fraudulent preference. The debenture for 3000*l.* issued to A. D. Tipper was to secure cash actually paid to the company at the time of the creation of the charge, and is therefore valid. The decision of Parker J. in *In re Orleans Motor Co.* (5) was based on the fact that the debt was the subject of an antecedent guarantee, and is distinguishable on that

(1) [1911] 2 Ch. 41, 45.
(2) [1917] 1 Ch. 283, 285.
(3) (1913) 47 Ir. L. T. 214, 215.
(4) [1922] 1 I. R. 26.
(5) [1911] 2 Ch. 41.

ground. The company agreed to pay its debt to Arthur Tipper & Co. out of the moneys advanced, because otherwise it could not keep its business going. It could only obtain further goods on credit from that firm, and it could get no more unless it paid for the goods already supplied. That was the dominating motive for the payment, and therefore there was no fraudulent preference. It cannot be said that this 1954*l.* was held by the company in trust for Arthur Tipper. The dictum of Astbury J. in *In re Hayman, Christy & Lilly, Ld.* (1), that "cash paid" means "cash unconditionally and absolutely paid" goes beyond the language of the section and is not good law.

[The rest of the argument was on the issue of fraudulent preference.]

Eve J. This is a summons whereby the liquidator of Matthew Ellis, Ld., seeks first a declaration that the payment of a sum of 1954*l.* 4*s.* made by the company to a firm of Arthur Tipper on or about March 29 was an undue and fraudulent preference of those creditors and accordingly invalid. Alternatively, he claims a declaration that a floating charge contained in a debenture for 3000*l.*, dated March 24, and created by the company and issued to Mr. Arthur David Tipper, a member of the partnership firm in whose favour it is said the undue preference was made, is invalid under s. 266 to the amount of 1954*l.* 4*s.*, being the amount which was in fact paid to the firm. [His Lordship then dealt with the question of fraudulent preference and held on the facts that there had been no fraudulent preference.]

But then arises a point which has been very ably argued on both sides: What is the position with regard to the debenture charging the floating assets of the company issued in order to give Mr. Tipper security for the 3000*l.* which he advanced, 1954*l.* of which was applied in paying the antecedent debt due to his firm, the balance of 1046*l.* being the only cash available for the company's then future trading? Now the answer depends upon the construction of s. 266, on which the liquidator's counsel has founded his argument. By that section it is provided that: "Where a company is being wound up"—and this company is being wound up—"a floating charge on the undertaking or property of the company created within six months of the commencement of the winding up"—as this charge was—"shall, unless it is proved that the company immediately after the creation of the charge was solvent"—and that has not been proved —"be invalid, except to the amount of any cash paid to the company at the time of or subsequently to the creation of, and in consideration for, the charge, together with interest on that amount at the rate of 5 per cent. per annum." The question is what is the meaning of the phrase: "except to the amount of any cash paid to the company at the time of . . . . the creation of . . . . the charge." On the one hand, it is said that this 3000*l.* was paid to the company and, having disposed of the suggestion of a fraudulent preference, that it was not improperly applied in payment of a then existing debt. It is admitted that the 1046*l.* was paid to the company and that can be put out of further consideration for the moment, but the question is: Can this 1954*l.* 4*s.* properly be described as cash paid to the company at the time of, or subsequently to, the creation of the charge. The words with which I have to deal have been construed more than once, and the intention of the section has been clearly pointed out. The late Parker J., in *In re Orleans Motor Co.* (1), says this: "The section was designed apparently to prevent companies on their last legs from creating floating charges to secure past debts or for moneys which do not go to swell their assets and become available for creditors." That has been accepted as and is, no doubt, a very useful guide as to what is the meaning to be attached to the section. It obviously treats the payment of past debts as something which the section intended to guard against. Past debts were not to be converted into secured debts by a security created within a limited time of the liquidation, and that view of the section is one which has been adopted and acted

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(1) [1917] 1 Ch. 283, 285.

(1) [1911] 2 Ch. 41, 45.

upon ever since the decision was pronounced. The next reported case in which the matter came up for consideration was a case before Astbury J., the case of *In re Hayman, Christy & Lilly, Ld.* (1) There Astbury J., after quoting the language which I have just read of Parker J., goes on to express an opinion with which, with all respect, I cannot agree. He says: "I think the expression 'except to the amount of any cash paid to the company' means 'except to the amount of any cash absolutely and unconditionally paid to the company.'" I cannot get that out of the section. It appears to me that there can be no impropriety in advancing money to the company and taking security for the same, the advance being burdened with a condition that it should be applied for some particular purposes of the company not including the payment of past debts. For instance, a man might be very much interested in the continued carrying on of a large business having regard to the dislocation of employment which would follow any determination of the business, and partly from motives of that sort and partly with a view to helping the company, he could surely put into the hands of the company, and obtain security for, a fund which would go to swell the assets of the company but which might be burdened with this condition that primarily, if not exclusively, it was to be applied in the payment of wages. Or, again, a case might arise where a company was prejudiced in its business by the absence of some piece of machinery or items of stock which the vendors were unwilling to supply except upon the terms that cash was paid for it. There again, it seems to me that the lender might well demand and obtain the benefit of security notwithstanding that he imposed on the company an obligation to expend the money in the acquisition of the particular machine or the particular assets which were necessary for the continuance of the company's business. With the greatest respect to this decision which, as Mr. Strangman has pointed out, does not seem to have been adversely commented on for some fifteen years, I am not prepared to accept the construction thereby imposed on the section as the right one.

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(1) [1917] 1 Ch. 283, 285.

That being so, what does the section mean? I think it means exactly what it says, that you have to measure the security by the amount of the cash received from the lender at or subsequently to the creation of the charge and in relation, therefore, to the amount which is to be applicable for the then future purposes of the company—not for discharging antecedent debts and certainly not for returning to the lender a large portion of the money either in payment of a former advance or past consideration or for any other consideration, but the security will stand as security for the actual cash made available to the company for the carrying on of its business subsequent to the execution of the charge, not including the discharge of any debt contracted antecedent to the date of the charge. I ought to say that Astbury J.'s construction was quoted, and I think I am right in saying, acted upon in two Irish cases, but in both of those two cases there were elements present which made it unnecessary for the Court to consider the addition made to Parker J.'s construction of the section by the words "absolutely and unconditionally."

Now that really disposes of the matter which I have to consider here, because it is not denied that the 1954*l.*, although it may pro forma have passed through the hands of the company, was dedicated from the beginning and was intended to be applied in payment of a past debt, the result of which would have been, if it was good and the security was good, that the unsecured debt of the Tipper partnership would have been converted into a secured debt in the hands of Mr. Tipper. That was a thing against which this section was directed, and in my opinion on the facts of this case, there being no fraudulent preference, the liquidator is entitled to the relief for which he has asked. From the date of the liquidation the security is to stand as security only for the difference between the 1954*l.* and the 3000*l.*

H. L. L.

Mr. Tipper appealed. The appeal was heard on January 11, 1933.

Lionel Cohen K.C. and *J. A. Reid* for the appellant. The whole of the 3000*l.* paid by the appellant was "cash paid to the company at the time of . . . . the creation of, and in consideration for, the charge" within s. 266 of the Companies Act, 1929. It is immaterial that there was an arrangement as to how 1954*l.* out of this amount was to be applied. It is not a case where in effect a charge was obtained to secure a past debt, as in *In re Orleans Motor Co.* (1) On the evidence the advance was made to enable the company to continue to carry on business, and in paying off the debt to the company's chief suppliers of goods, it was securing the continuation of the supply on credit. The fact that before the advance was made it was arranged that 1954*l.* should be applied for this purpose does not make the payment by the respondent company the less a cash payment. Eve J. has held that the extent of the security is measured by cash received by the company and applicable for its future purposes. There is no justification for this limitation either in the section itself or in the judgment of Parker J. in *In re Orleans Motor Co.* (1) In that case the directors had merely paid sums through the company in discharge of their liability as guarantors of the company's overdraft. They were thus seeking to convert an unsecured liability into a secured debt. So too in *In re Hayman, Christy & Lilly, Ld.* (2), the only cash paid in respect of the debenture in question had been repaid before the winding-up. It was in that case, however, that Astbury J. expressed the opinion that the words in the section corresponding to s. 266 of the Companies Act, 1929, "except to the amount of any cash paid to the company" meant "except to the amount of any cash absolutely and unconditionally paid to the company." There is no justification for this dictum, and Eve J. has rightly refused to accept it. But in doing so, Eve J. has sought to put another limitation on the words of the section—namely, that the

(1) [1911] 2 Ch. 41.

(2) [1917] 1 Ch. 283.

security must be measured by the amount of the cash received from the lender and "applicable for the then future purposes of the company." It is contended that there is equally no justification for this limitation.

[They also referred to *In re Olderfleet Shipbuilding Co.* (1)]

Topham K.C. and *J. G. Strangman* for the respondent. The whole question turns on the construction of s. 266 of the Companies Act, 1929, and it has to be remembered that it is dealing only with a case where a company is insolvent when it issues the debenture in question and goes into liquidation within six months of that date. It is contended that a loan cannot be treated as validly secured when it has been previously agreed that the loan is to go in paying a past debt of the company to the lender and others. In *In re Orleans Motor Co.* (2) Parker J. expressed the opinion that the corresponding section of the Companies (Consolidation) Act, 1908, was intended to permit only those floating charges which swelled the company's assets. Here the 1954*l.* merely passed through the company's hands to pay the Tipper firm's past debt, just as in *In re Orleans Motor Co.* (2) the money paid went to discharge an existing overdraft. To the extent therefore of the 1954*l.* there was no cash payment within the meaning of s. 266 of the Companies Act, 1929. The position is just the same, having regard to the antecedent arrangement, as if the appellant had said he would pay 1954*l.* to some person other than the company. There may be some difficulty in maintaining Astbury J.'s view expressed in *In re Hayman, Christy & Lilly, Ld.* (3), that the payment must be free and unconditional but the payment must be new money of the company, with liberty to the company to deal with it as it wills. Here the payment was made to the company on condition of its applying 1954*l.* in satisfaction of an unsecured debt to the firm. The motive of the payment is not really relevant. The section on its true construction is intended to protect unsecured creditors against a floating charge being given at the last moment unless the

(1) [1922] 1 I. R. 26.
(2) [1911] 2 Ch. 41.
(3) [1917] 1 Ch. 283, 285.

company's assets were increased by the amount secured by the floating charge. The effect of the transaction here was that to the extent of 1954*l.* security was being given for a past unsecured debt, and the debenture cannot therefore stand so far as regards that amount.

[No reply was called for.]

LORD HANWORTH M.R. This appeal must be allowed. It raises an interesting point under s. 266 of the Companies Act, 1929. Matthew Ellis, Ld., was carrying on business until on July 11, 1932, a compulsory order was made for the winding-up of the company. When the affairs of the company were looked into the liquidator found that on March 24, 1932, 3000*l.* had been lent to the company by Mr. Arthur Tipper. That 3000*l.* was used in this way. The company, in carrying on its business, required certain goods to be supplied to it, and it obtained those goods from a firm of Messrs. Arthur Tipper. In March, 1932, a considerable debt had accrued due to the firm of Arthur Tipper. The terms on which the goods were supplied by the firm to the company were payment one month after delivery, but Messrs. Arthur Tipper, in order to facilitate the company's business, had stood aside and allowed the debt to them to reach the sum of 1954*l.*

The question was whether the company could continue its business. There were two directors of the company at that time, Mr. Arthur Tipper and Mr. Joseph Turnbull. Mr. Arthur Tipper was also a partner with two other persons in the firm of Messrs. Arthur Tipper. The two other persons were a Mr. Fred Taylor and Mr. Tipper's son, Mr. Harry Tipper. The interests of the partners inter se is not disclosed. Mr. Arthur Tipper had come to the assistance of the company in its difficulties before March, and no question arises as to what happened in reference to a loan which he had made to it. But it is said that this debenture of 3000*l.* of March, 1932, is bad, because it falls within the purview of s. 266, inasmuch as the company at the time of the creation of the charge was not solvent and hence the debenture is invalid except to the amount of any cash paid to the company at the time or subsequently to the creation of and in consideration for the charge. Eve J. came to the conclusion that the debenture was invalid except as to the amount of 1046*l.*, because the balance of the 3000*l.*, namely 1954*l.*, was used to discharge the debt at that time due to Messrs. Arthur Tipper. Eve J. based his decision in effect upon a decision of Parker J. in *In re Orleans Motor Co.* (1), and we have to determine whether or not we agree with the view that Eve J. has taken and the law which he has applied.

I agree with Eve J. to this extent, that I think this case and other cases under this section must, each of them, depend upon their own facts. It is very difficult to lay down a precise test which shall bring a case within or without the section. It is wiser to adhere to the clear words of the section, which require the sum in respect of which the debenture is valid to be the amount of any cash paid to the company. One has therefore to look at the facts and see whether or not in substance there was cash paid to the company. It is not suggested that payment may not be by a cheque or by a transaction the equivalent of cash among business men. I therefore come to examine the facts which are before us relating to this transaction. We find those facts in three affidavits. The first is an affidavit of Mr. Tipper himself, and in clauses 5 and 6 he tells the story: "The company carried on the business of hardware merchants and after I had acquired shares in it the firm of Arthur Tipper of which I together with Fred Taylor and my son Harry Tipper both of whom are respondents to this summons are the partners supplied it with large quantities of goods. According to the usual credit terms in this class of trade, goods supplied in one month should be paid for in the course of the ensuing month, but notwithstanding this between June, 1931, and February, 1932, Messrs. Arthur Tipper supplied to the company goods to the total value of 2386*l.* 11*s.* 10*d.* against which they received payments only to the amount of 432*l.* 7*s.* 10*d.* leaving a balance of 1954*l.* 4*s.*

(1) [1911] 2 Ch. 41.

outstanding on the 29th February, 1932." Then he says: "In the latter part of March, 1932, the company's financial position was difficult though not as I thought desperate. I was confident that if further money were provided it would overcome its difficulties. My co-director and I carefully discussed the matter and on the 24th March, 1932, we decided that it was worth while to continue the business. We arranged therefore that I should advance to the company a sum of 3000*l.* upon the security of a third debenture. With respect to the disposal of this money we felt that as my firm of Arthur Tipper had stood aside and continued to supply goods during the 9 months down to and including February, 1932, without being paid according to the usual credit terms in order that other creditors of the company might be paid, it was only reasonable if, as was intended, they were to continue to supply goods to the company that they should be paid for goods supplied down to the end of February, 1932." Mr. Turnbull, the other director, gives an account which is to be found in clauses 4 and 5 of his affidavit. He makes this relevant observation in clause 5: "Moreover Messrs. Arthur Tipper were the company's principal suppliers of goods and were the only firm to which the company could safely look for the supply of goods for the purposes of its business on the usual credit terms. Mr. Tipper and myself were confident that the company's business was worth preserving for the benefit of its creditors generally and that with Mr. Tipper's assistance we should be able to carry the company through its difficulties and re-establish its position and the payment of Messrs. Arthur Tipper was made in pursuit of that object and not to give that firm a preference." The remaining affidavit is that of the two partners, Mr. Fred Taylor and Mr. Harry Tipper. They say: "We told him [Mr. Tipper] that the amount due to Messrs. Arthur Tipper ought to be paid out of the first moneys to be provided by him as Messrs. Arthur Tipper had stood aside for so many months while payments were made to other suppliers. We also pointed out to him that if the company wished Messrs.

Arthur Tipper to continue to supply goods on credit it would clearly be necessary for the company to pay the amount due for goods down to date. As a result of the discussion between the partners of Messrs. Arthur Tipper it was arranged that if Mr. Tipper advanced a sum of 3000*l.* on debenture to the company, the amount due to Messrs. Arthur Tipper for goods supplied down to the end of February, 1932, should be paid and that if this amount was paid Messrs. Arthur Tipper should continue to supply goods on credit to the company in order to keep the business of the company going."

It is important to observe that Eve J. has found that there was no fraudulent preference in the present case by the payment of the 1954*l.* to Messrs. Arthur Tipper. That was an alternative case which was presented by the liquidator. He has therefore found, and indeed in express terms has said, that it was a case to which the word "fraud" could not be attached. This is therefore to be looked at as an ordinary transaction between business men based on sound business views, and after reading those paragraphs what is the summary of the position? It is this: (1.) that the company's business was worth saving; (2.) that in order to continue its business it must still have goods supplied to it; (3.) that Messrs. Arthur Tipper were the firm from which further goods could be obtained on credit; and (4.) that if Messrs. Arthur Tipper were to continue to supply goods on credit in order to keep the company's business going, it was right that the debt owing to them down to the end of February should be paid. The result is that what was arranged was not merely a payment to satisfy Messrs. Arthur Tipper but a business transaction in which by this payment the company secured the good will of Messrs. Arthur Tipper and their willingness to continue to supply goods on credit to the company to keep its business going. In fact that course of business was adopted, and we are told that down to July, when the liquidator was appointed, a further debt of some 500*l.* in respect of goods sold and delivered by Messrs. Arthur Tipper to the company had been incurred.

The sum of 3000*l.* was upon delivery of the debenture paid by Mr Arthur Tipper to the company which carried out the plan agreed upon. It paid over to Messrs. Arthur Tipper 1954*l.*, and then had 1046*l.* in hand. It used 750*l.* of that to satisfy the claims of the bank, and thereby secured, as I understand it, further credit from the bank. That left the company with some 300*l.* with which to go on trading, and it did succeed in going on trading from March until July.

What is said against this debenture is that if you separate the transaction into two you will find that there was a payment in cash to the company of 1046*l.* and a payment to the advantage of the company, though not to it, of 1954*l.* It is therefore argued that 1954*l.* was only paid through the company, which acted merely as a conduit pipe, and that the payment was really direct from Mr. Arthur Tipper to the firm of Messrs. Arthur Tipper, so that by this stratagem a secured liability to Mr. Arthur Tipper was substituted for the company's unsecured liability to the firm. I do not think it is right to divide up the transaction in this way. It must be looked at from a business point of view, as was done at the time when it was entered into by the persons concerned. It seems that the company did secure a valuable advantage in the continuation of the supply of goods by Messrs. Arthur Tipper to them, and the transaction must be considered as a whole and not split up. Having regard then to the substance of the case, I ask myself whether there was a payment in cash made to the company in respect of the whole 3000*l.*? The answer, I think, must be yes; and when the money had been so received, it was used, and prudently used, by the company to the extent of 1954*l.* in the payment of a debt then outstanding whereby they were able to secure the continuance of supplies from Messrs. Arthur Tipper. With regard to the rest of the 3000*l.* there is no question that it is a payment in cash, but it does not seem right to separate the transaction into two parts. It was all one transaction. The loan of 3000*l.* enabled the company to continue to carry on business, one important element requisite for that purpose being a continuation of the supply of goods on credit from Messrs. Arthur Tipper.

That, to my mind, on an examination of the facts, is sufficient to answer the claim now made by the liquidator; but it is said that two cases show that the interpretation that I have suggested for this section is not a valid one. The first is *In re Orleans Motor Co.* (1), which came before Parker J. To my mind that case must be examined in relation to the facts before the learned judge. It was a case in which certain cheques passed through the company's hands but were never part of the company's assets to do what it liked with, since the company was under an obligation to hand them to the bank in discharge of an overdraft guaranteed by the lenders. The debentures in question were to be issued on account of the guarantee. In truth and in fact the company never became possessed of this money which passed through their account. The learned judge in that case made the observation about the section (2) that it "was designed apparently to prevent companies on their last legs from creating floating charges to secure past debts." So far I respectfully agree with him. It was to prevent a security being given to one unsecured creditor by a device. Then he goes on: "or for moneys which do not go to swell their assets and become available for creditors." I doubt very much whether the learned judge intended to say that such a transaction must be tested to see whether the assets were swollen and became available for creditors, because the creditors would be persons to whom debts had already been incurred. It appears to me that the whole passage is giving an illustration of the general purposes of the section; but I think it would not be right to treat it as an authoritative exposition of the intention of the section except as regards the statement that it was designed to prevent companies from creating floating charges to secure past debts. In the present case that was not what happened. The debenture did not merely secure past debts;

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(1) [1911] 2 Ch. 41.

(2) Ibid. 45.

it obtained for the company the advantage of being able to continue its business.

The later case of *In re Hayman, Christy & Lilly, Ld.* (1), which came before Astbury J. is one in which that learned judge purported to translate the observation of Parker J. into more exact words. He took the words of Parker J. to mean that a debenture issued in the circumstances mentioned in the section was not to be valid, " except to the amount of any cash absolutely and unconditionally paid to the company." I associate myself with Eve J. in refusing to accept that interpretation of Parker J.'s words or of the section. I hold, as Eve J. does, that Astbury J.'s definition ought not to be accepted.

But I prefer, as I have said already, to treat the case as one in which the facts must be examined in the light of the terms of the section itself. The Court has, in regard to transactions which may often be complicated and difficult, to come to a conclusion whether in substance the debenture it is sought to invalidate has been issued for cash paid to the company. If it has been, then, although the cash may be used by the company for the purpose of meeting a liability already incurred, the security stands good.

For these reasons I have come to the conclusion that we cannot accept Eve J.'s decision, and the order will be that the application of the liquidator be dismissed.

SLESSER L.J. I am of the same opinion. The question to be considered is whether 1954*l.* 4*s.*, part of the sum of 3000*l.* in respect of which the floating charge was granted, was cash paid to the company, because by s. 266 of the Companies Act, 1929, the floating charge is only valid to the extent of any cash paid in respect of it to the company. Attempts have been made to give some strict legal limitation to the words " to the amount of any cash paid to the company." Astbury J., in *In re Hayman, Christy & Lilly, Ld.* (2), says: " I think the expression 'except to the amount of any cash paid to the company' means 'except to the amount of any cash absolutely and unconditionally paid to the company.' " Now if that be a correct view of the meaning of the words, I think that it would be right in this case to say that there was here such a condition as to the use of this money that it could not be said to be absolutely and unconditionally paid to the company. But I follow Eve J. in being unable to see on what principle Astbury J. placed that limitation upon the plain language of the section. He purports to come to the conclusion that that limitation should be read in by reason of what was said by Parker J. in *In re Orleans Motor Co.* (1) I agree with what the Master of the Rolls has said about the facts of that case as showing that Parker J. was there dealing with an independent transaction, and I do not find in anything that Parker J. said any authority for imposing the limitation that the amount of cash must be absolutely and unconditionally paid as suggested by Astbury J. But then, having declined to accept the limitation imposed by Astbury J., Eve J. himself imposes another limitation, and it is by reason of the limitation imposed by him on the words "except to the amount of any cash paid to the company," as applied to the facts of this case, that he has come to his conclusion. In the course of his judgment he says: "That being so, what does the section mean? I think it means exactly what it says, that you have to measure the security by the amount of the cash received from the lender at or subsequently to the creation of the charge and in relation, therefore, to the amount which is to be applicable for the then future purposes of the company—not for discharging antecedent debts and certainly not for returning to the lender a large portion of the money either in payment of a former advance or past consideration or for any other consideration." Then again he says: "Now that really disposes of the matter which I have to consider here, because it is not denied that the 1954*l.*, although it may pro forma have passed through the hands of the company, was dedicated from the beginning and was intended to be applied in payment of a past debt, the result

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(1) [1917] 1 Ch. 283.

(2) Ibid. 283, 285.

(1) [1911] 2 Ch. 41.

of which would have been, if it was good and the security was good, that the unsecured debt of the Tipper partnership would have been converted into a secured debt in the hands of Mr. Tipper." I understand and follow the learned judge when he says that there is not a payment of cash to the company in so far as the money paid by the lender is returned to him; but here, as he points out, the money was owed to the Tipper partnership and not to the lender, and the partners were Mr. Tipper senior, Mr. Tipper junior, and a Mr. Fred Taylor, three persons the nature of whose holdings we are not told. It is not a case on the evidence of a transaction for the return of the money advanced to the lender. But apart from that, I cannot for myself read into the section the limitation that money cannot in any circumstances be cash paid to the company if it is applied in discharge of an antecedent debt. It may or may not be. It appears to me that we have to consider on the language used in the section itself whether there was cash paid to the company—a substantial payment of cash—without imposing the limitation, as Eve J. has done, that the cash must not be applied in satisfaction of an antecedent debt. On the evidence, and for the reasons which my Lord has stated, I can find no reason why this Court should hold that to the extent of this sum of 1954*l*. there was not a cash payment to the company. The company was indebted to the firm of Tipper and that part of the money was paid for them to satisfy that indebtedness. Certain advantages—namely, the payment of that indebtedness and the ability of the company to obtain a further supply of goods from the firm—were only secured by that payment of money lent by Mr. Tipper personally on the security of his debenture. I think it is clear on the evidence before us, when those two limitations suggested by Astbury and Eve JJ. are removed, and the question is considered whether there was in fact a cash payment in respect of the sum of 1954*l*. to the company, that there clearly was, and therefore that the case falls within the exception to s. 266, with the result that the floating charge is valid. This appeal, therefore, should be allowed.

ROMER L.J. I have arrived at the same conclusion. We have heard a certain amount of argument as to the construction to be placed upon s. 266 of the Companies Act, 1929. For myself I have never been able to understand how any question of construction arises on that section. Its words appear to be quite plain, and I can see no justification for excepting from the words "cash paid" in the section payments of cash made conditionally as to their mode of application. Astbury J., in *In re Hayman, Christy & Lilly, Ld.* (1), excepted from those words cash payments as to which a condition of any kind is imposed by the lender. Eve J. has given what in my opinion appears to be conclusive reasons for not adopting that construction. He has, however, himself, as I read his judgment, excluded from the words any payments of cash made upon the condition that the cash shall be applied in discharge of an existing liability of the company. For myself, I am unable to impose any such restriction upon the words of the section. Where, therefore, a man advances money to a company on the security of a debenture on the terms that the money so advanced is to be applied by the company in discharge of one of its existing liabilities or in the acquisition of some asset which the company does not at the moment possess, the money paid by the lender does not in my opinion cease to be cash paid to the company merely by reason of the imposition of that condition. There are, of course, certain considerations for the issue of a debenture which plainly do not amount to payments in cash. Where, for instance, an existing creditor of a company takes a debenture from the company to secure the amount of his debt on the terms that he shall not immediately press for payment of his debt, or where he takes a debenture for the amount of his debt on the terms that the debt itself is to be extinguished, obviously no cash passes from the debenture holder to the company. If in such a case he goes through the form of drawing a cheque in favour of the company for the amount of his debt on the terms that the company shall forthwith itself hand to him in exchange a cheque for the same amount, there has in form been a payment in cash. But in such a case there has not been a payment in cash if one looks at the substance and not at the form, and in considering whether there has been a payment in cash within the meaning of s. 266 it is always the question of substance that must be regarded and not the question of form. Parker J. had a case to decide under the section (or rather the section of the earlier Act which corresponds to s. 266 of the present Act) in *In re Orleans Motor Co.* (1) In that case directors of a company who had guaranteed the company's overdraft were being pressed by the bank, as indeed was the company, for repayment of the overdraft. 1500*l.* was the amount that the bank required to be paid. The company was liable for it as principal debtor and the directors were liable for it as guarantors. The company being unable to pay, the obvious thing would have been for the guarantors to pay the 1500*l.*, in which case they would have been unsecured creditors of the company for that amount. Instead of that, they went through the form of handing three cheques for 500*l.* to the company on the terms that the company should hand those cheques over to the bank and issue debentures for the amount to them, and they then said that they had paid cash to the company. Parker J. was not misled by such a transparent subterfuge, and held that there had not in fact been any cash paid. The directors had not parted with any cash to the company and never intended to part with any cash to it. The company never received any cash from the directors and never contemplated receiving any cash from them. All that had happened was that the directors had, using the company as a conduit pipe, paid 1500*l.* cash to the bank. Of course, that debenture was invalidated by the section.

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(1) [1917] 1 Ch. 283.

In the present case, if I am right, all that has to be considered is whether as a matter of substance—looking at the substance and not at the form—Mr. Tipper paid cash to the company. I can well understand that, if it had

(1) [1911] 2 Ch. 41.

transpired that the two persons to whom Mr. Tipper refers as his partners were mere figures holding no real interest in the partnership, and that the partnership was only another name for Mr. Tipper himself, it might have been held that as regards the sum of 1954*l.* paid over to the partners there was no payment in cash to the company. But there is no such evidence; indeed, the evidence strongly suggests to my mind that these other two partners were real persons with a live interest in the partnership firm negotiating on its behalf. The fact is that Mr. Tipper, the debenture holder, has parted with 1954*l.* in cash out of his private estate, and that that cash has been handed over by the company to the firm of which indeed Mr. Tipper is a partner, but of which he is not the only partner, and in which he does not hold the only interest or even a controlling interest so far as I know. Why in those circumstances it should be said that this was merely a subterfuge to make it appear there had been a payment in cash when there was in fact no payment in cash I do not know. The circumstances appear to me to point strongly in favour of the conclusion that here there was in truth and in fact, in substance and not merely in form, a payment of cash by Mr. Tipper to the company.

For these reasons I have come to the conclusion that this appeal should be allowed.

Appeal allowed.

Solicitors for the appellants: *Stibbard, Gibson & Co., for Maycock & Hayward, Birmingham.*

Solicitors for the respondent: *Syrett & Sons.*

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[1932. F. 300.]

Landlord and tenant—Agricultural holding—Sale of holding—Notice to quit—Notice given by purchaser before completion—Validity—"Landlord"—Estoppel—Right to Compensation—Jurisdiction—Agricultural Holdings Act, 1923 (13 *&* 14 *Geo.* 5, *c.* 9), *s.* 12, *sub-s.* 1; *s.* 57 *sub-s.* 1.

The plaintiff was the tenant of two farms on a yearly tenancy. The owner of the property died in 1928 and on July 17, 1930, his personal representatives agreed to sell the defendant the farms. The date fixed for completion was September 15, 1930, but the purchase was not completed till October 30, 1930. Meanwhile the defendant had on October 9, 1930, sent to the plaintiff a notice to quit the premises on October 11, 1931, and the plaintiff duly gave up possession on that date. The defendant disputed the plaintiff's claim to compensation under the Agricultural Holdings Act, 1923, on the ground that the notice to quit was invalid, because the purchase was completed only after the notice was given. The plaintiff therefore brought proceedings claiming declarations (1.) that the notice to quit was valid; (2.) that, if not, the defendant was estopped from denying its validity; and (3.) that he was entitled to compensation under the Act:—

Held, by Bennett J., (1.) that the provisions of the Agricultural Holdings Act, 1923, did not empower the purchaser of an agricultural holding to give to a tenant, before the completion of the purchase, an effective notice to quit; (2.) that on the facts the defendant was estopped by his conduct from denying the validity of the notice, with the result that the plaintiff was entitled to compensation under the Act.

Held, by the Court of Appeal, (1.) (affirming Bennett J.'s decision) that on the facts the plaintiff was estopped from denying the validity of the notice to quit; (2.) that the Court had jurisdiction to determine the matters at issue, notwithstanding the provisions for arbitration contained in s. 16 of the Act.

WITNESS ACTION.

The plaintiff was in October, 1930, in occupation of two farms near Bury St. Edmunds, known as the Eldo House Farm and Mount Farm, which formed part of an estate known as the Moreton Hall Estate, under a yearly tenancy which had been constituted by a written agreement dated April 24, 1918, and made between the plaintiff and the owner of the land, who died in May, 1928. On July 17, 1930, the defendant entered into a contract with the legal personal representatives of the owner of the property for the purchase of the Moreton Hall Estate. One of the conditions of sale (which incorporated the 11th ed. of the National Conditions of Sale) was as follows :—

"3 (1.) The purchaser shall pay the remainder of his purchase money at the office of the vendor's solicitors mentioned in the contract on the day fixed for completion of the purchase, or if no day be fixed at the expiration of five weeks from the day of the delivery to him or his solicitor of the abstract of title.

(2.) The purchase money having been paid the rents or other income or possession shall be received or retained and the outgoings discharged by the vendor up to the day fixed for completion of the purchase, and as from that day the outgoings including insurance premiums shall be discharged and the rents or other income or possession taken by the purchaser and such rents or other income and outgoings shall if necessary be apportioned between the vendor and purchaser for the purposes of this condition and the proper apportioned part shall be paid with or deducted from the purchase money."

The date fixed for the completion of the purchase was September 15, 1930, but the purchase was not completed until October 31, 1930. The defendant, however, on October 9, 1930, sent to the plaintiff a notice to quit in the following terms: "I hereby give you notice to quit and deliver up possession of the Eldo House and Mount Farms with the appurtenances situate in the parishes of Bury St. Edmunds and Rougham in the County of Suffolk which you hold of me as tenant thereof on October 11, 1931, or at the expiration of the year of your tenancy which shall expire next after the end of twelve months from service of this notice. Dated October 9, 1930."

The plaintiff received the notice on October 10, 1930, and gave up possession of the farms on October 11, 1931.

A dispute having arisen between the parties as to the validity of the notice, the plaintiff commenced an action for a declaration (1.) that the notice to quit was an effective notice, (2.) that the defendant was estopped from denying that it was effective, and (3.) that the plaintiff was entitled

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to compensation for disturbance and for improvements in respect of the premises, subject to and in accordance with the provisions of the Agricultural Holdings Act, 1923.

Galbraith K.C. and *A. J. Spencer* for the plaintiff. The question is whether the equitable owner of an agricultural holding can give notice to quit to a tenant. The defendant was, at the date of the giving of the notice, the landlord within the meaning of ss. 12 and 57 of the Agricultural Holdings Act, 1923. (1)

In this particular case the defendant satisfies the definition of a person who is under s. 57 the landlord. He had at a date earlier than October 9, 1930, entered into a contract to purchase the land and to receive the rents and profits: *Allen* v. *Inland Revenue Commissioners* (2); *Dale* v. *Hatfield Chase Corporation* (3); *Richards* v. *Pryse* (4); and *Stait* v. *Fenner* (5) were referred to.

The defendant is, in any event, estopped by his conduct from denying the validity of the notice to quit. There is no legal defence to this case. On the facts a strong case of estoppel has been amply established.

[They referred to *de Tchihatchef* v. *The Salerni Coupling, Ld.* (6); *Greenwood* v. *Martins Bank* (7); *Fenner* v. *Blake* (8); *Freeman* v. *Evans* (9); *Westlake* v. *Page* (10); *Redgrave* v. *Hurd* (11); *Gresham Life Assurance Society* v. *Crowther* (12); *Metcalfe* v. *Boyce* (13); *Phené* v. *Popplewell* (14); *Mollett* v.

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(1) Sect. 12, sub-s. 1, provides: "Where the tenancy of a holding terminates by reason of a notice to quit given by the landlord, and in consequence of such notice the tenant quits the holding, then" [here follow certain immaterial conditions under which compensation would not be payable] "compensation for the disturbance shall be payable by the landlord to the tenant in accordance with the provisions of this section."

Sect. 57, sub-s. 1, provides: "In this Act, unless the context otherwise requires,—'Landlord' means any person for the time being entitled to receive the rents and profits of any land."

(2) [1914] 2 K. B. 327.

(3) [1922] 2 K. B. 282.

(4) [1927] 2 K. B. 76.

(5) [1912] 2 Ch. 504.

(6) [1932] 1 Ch. 330.

(7) (1931) 47 Times L. R. 607.

(8) [1900] 1 Q. B. 426.

(9) [1922] 1 Ch. 36.

(10) [1926] 1 K. B. 298.

(11) (1881) 20 Ch. D. 1.

(12) [1914] 2 Ch. 219.

(13) [1927] 1 K. B. 758.

(14) (1862) 12 C. B. (N. S.) 334.

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Brayne (1); *Spencer* v. *Williams* (2); *Bradshaw* v. *Bird* (3); *Tombs* v. *Turvey*. (4)]

Hon. S. O. Henn Collins K.C. and *Guy Aldous* for the defendant. Sect. 12 does not begin to operate until the contract to purchase has been put an end to in law. A notice to quit given by a stranger cannot affect the parties: see *Stait* v. *Fenner*. (5) The notice to put an end to a tenancy must be given by the legal owner of the property: see *Tasker* v. *Small* (6); *Jones* v. *Phipps*. (7) Even if the person who gives the notice is not the owner, he must be the person in receipt of the rents and profits at the time of the giving of the notice: *Mann* (*Doe* d.) v. *Walters*. (8)

[They also referred to *Richards* v. *Pryse* (9) and to Condition 3 (1.), (2.), of the 11th ed. of the National Conditions of Sale.]

If the plaintiff received a notice under which he was not bound to go, estoppel would not avail him at all. On the evidence the conduct of the plaintiff has been such that he cannot seek to estop the defendant.

[They referred to *In re Bebington's Tenancy* (10); *Huddleston* (*Doe* d.) v. *Johnston* (11); *Mollett* v. *Brayne*. (1)]

Galbraith K.C. in reply.

BENNETT J. [after stating the facts, continued:] The first question that has been argued between the plaintiff on the one side and the defendant on the other is whether the notice dated October 9, 1930, was a valid notice and one which put an end to the tenancy of the plaintiff on October 11, 1931, having regard to the fact that, when it was given, the defendant had not completed the purchase of the Moreton Hall Estate. The plaintiff bases his contention upon the language of the Agricultural Holdings Act, 1923, and in particular upon the language of s. 57, which defines certain terms which are to be found in the Act, and

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(1) (1809) 2 Camp. 103.
(2) (1871) L. R. 2 P. & M. 230.
(3) [1920] 3 K. B. 144.
(4) (1923) 93 L. J. (K. B.) 785.
(5) [1912] 2 Ch. 504.
(6) (1837) 3 My. & Cr. 63, 70.
(7) (1868) L. R. 3 Q. B. 567.
(8) (1830) 10 B. & C. 626.
(9) [1927] 2 K. B. 76.
(10) [1921] 1 Ch. 559.
(11) (1825) McCle. & Yo. 141.

s. 12, which gives the tenant in certain events compensation for disturbance. So far as material s. 57 provides: " In this Act, unless the context otherwise requires,—'Landlord' means any person for the time being entitled to receive the rents and profits of any land." The first point made on behalf of the plaintiff is that the defendant Orttewell satisfies that definition, and that he was on October 9, 1930, the person entitled to receive the rents and profits of Eldo House Farm and Mount Farm, although he had not on October 9, 1930, completed the purchase. As a matter of construction of the contract, in my judgment, Mr. Orttewell on October 9, 1930, was a person entitled not at law but in equity to receive the rents and profits of the land, that is to say, of the two farms, because by the terms of the contract he was entitled to the rents and profits from the day fixed for completion—namely, September 15, 1930.

Then the argument is that, being the landlord within the meaning of s. 57, when you come to look at s. 12 the only conclusion that can be arrived at is that he was the landlord within the meaning of that section and that the notice given by him terminated the tenancy, with the result that the tenant became entitled to the compensation for disturbance which the section gives him provided that the other conditions in the section are fulfilled. The section opens in this way: " Where the tenancy of a holding "—and the two farms in question are a holding within the meaning of the section—" terminates by reason of a notice to quit given by the landlord, and in consequence of such notice the tenant quits the holding, then,"—unless certain things happen with which we are not concerned—" compensation for the disturbance shall be payable by the landlord to the tenant in accordance with the provisions of this section." The argument is that Orttewell was on October 9, 1930, the landlord, and that the plaintiff's tenancy terminated by reason of the notice which the defendant gave him, with the statutory consequences.

The answer which the defendant makes to that contention is that s. 12 does not confer upon a person who has no power to determine a tenancy a power so to do, and that the section is based upon the view that the tenancy has been determined by somebody who, quite apart from any of the provisions contained in the statute, has the right to determine it, and that if and when you have arrived at the conclusion that the tenancy has been determined, and that the person by whom it has been determined is the landlord, that then and only then the tenant's right to compensation for disturbance arises. Those are the two opposing contentions, and, so far as I know, there is no express authority upon the point. It does not seem to me that in any of the cases which Mr. Galbraith cited to me that particular question arose for consideration. Although I have had, I confess, considerable difficulty in arriving at a conclusion, the conclusion at which I have arrived is that the argument of the defendant ought to prevail on this part of the case. It does not seem to me that the Act of 1923 was intended to give or did give to anybody who had no power to determine a tenancy a power to determine one if the tenancy was an agricultural tenancy. Therefore it seems to me that the first claim advanced by the plaintiff based on the effect of the Act fails.

But then he says there is a question of estoppel. He says: "By the notice which the defendant gave me on October 9, 1930, he represented to me that he was my landlord, and thereafter on the faith of that representation and believing that the defendant was my landlord and was a person who was in a position to determine my tenancy, and that the notice of October 9, 1930, was a notice which did put an end to my tenancy on October 11, 1931, I altered my position and took various steps which were to my detriment if the notice of October 9 was invalid. In those circumstances, and on those facts, the defendant cannot be heard to say, or to give evidence to the effect, that he was not on October 9, 1930, my landlord." On that footing a claim is made for a declaration that the defendant is estopped from denying that on October 10, 1930, he was the landlord of the plaintiff and entitled at law to determine it under the provisions of the agreement of April 24, 1918. I have no doubt that the notice of October 9, 1930, did represent to the plaintiff that the defendant was on that day his landlord.

As regards the question whether or not the plaintiff was of the belief from the time he received the notice until a date in August, 1931, that the defendant was his landlord and that the notice was a valid and effective one, there has been, between the plaintiff on the one side and the defendant and his witnesses on the other, an acute conflict of testimony. The plaintiff has sworn that he never knew anything about the completion by the defendant of his contract to buy Moreton Hall Estate until some date which he puts in August, 1931, and that until that date, with the exception of some conversation which passed between him and the defendant's solicitor, Mr. Chamberlayne, on February 13, 1931, he had no reason to doubt but that the defendant was on October 9, 1930, his landlord, and that he had no reason to doubt but that the notice was a valid and effective notice intended to be acted on by the defendant. On the other hand, evidence has been given for the defendant by Mr. Scott, who had acted as the defendant's agent in the purchase of the property, that at some date between October, 1930, and Christmas of 1930 the plaintiff came to him and told him that he knew the notice to quit was an invalid notice, because the defendant had not on October 9, 1930, completed his purchase, and that he, the plaintiff, was not going to quit the farm on October 11, 1931. Evidence has been given by Mr. Chamberlayne, the defendant's solicitor, that in October, 1930, after the plaintiff had received the notice to quit, he in the course of a conversation on the Bury St. Edmunds Corn Exchange told the plaintiff that the notice was bad, because the defendant had not completed his purchase at the time the notice was given. It has not been an easy matter to decide, and I must not be regarded as holding or implying that anybody who has given evidence has endeavoured wilfully to mislead the Court. My conclusion, after considering the evidence as a whole and the other matters to which I have referred, is that the plaintiff's evidence is to be accepted, and that he

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believed when he received the notice on October 10, 1930, and continued in the belief right up to the month of August, 1931, that the notice was a valid notice, that the defendant was his landlord and a person in a position to give a valid notice, and that the notice was one which compelled him to give up his holding on October 11, 1931. I am also satisfied in point of fact that in that belief the plaintiff on February 3, 1931, orally agreed to become the tenant of a farm called Gazeley Farm, that he took steps, as he was bound to do under the provisions of the tenancy agreement of April 24, 1918, to leave the lands which he had taken from the owner of the Moreton Hall Estate at the end of his tenancy—namely, October 11, 1931, on the four course shift: that he sold cottages which he was using for the purposes of housing workmen employed by him on the Eldo House and Mount Farms: that he bought a blacksmith's shop in the vicinity of Gazeley Farm, and that he got rid by auction of stock for which, having regard to the fact that his tenancy of the Eldo House and Mount Farms was coming to an end, he might have no use after October 11, 1931. I have come to the conclusion on the evidence that he did those things on the representation made to him by the defendant when he gave him the notice on October 9, 1930.

The question is whether, in those circumstances, it is open to the defendant to deny that he was the landlord of the plaintiff on October 9, 1930, or that the notice to quit was valid. A very large number of authorities have been referred to. I think there is a broad principle stated by Luxmoore J. in the case of *de Tchihatchef* v. *The Salerni Coupling, Ld.* (1), which affords a sufficient basis for the conclusion at which I have arrived, which is that there should be a declaration substantially in the form the plaintiff asks. Luxmoore J., in the course of his judgment, says: "If a person authorizes or permits another to make a representation for the purpose of it being acted upon and it is acted upon, that person cannot afterwards be heard to say that the representation is not true." That is the basis upon which

(1) [1932] 1 Ch. 330, 342.

I decide in favour of the plaintiff. It seems to me that Mr. Orttewell, when he sent to the plaintiff the notice to quit on October 9, 1930, represented to Mr. Farrow that he was the landlord and that he was putting an end to Mr. Farrow's tenancy. I am satisfied that in point of fact Mr. Farrow acted upon that representation to his detriment in the respects which I have stated and, accordingly, I propose to make a declaration that the defendant is estopped from denying the validity of the notice, and that the plaintiff is entitled to compensation subject to and in accordance with the provisions of the statute.

J. L. D.

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The defendant appealed. The appeal was heard on February 21 and 22, 1933.

Two points were taken on behalf of the appellant: (1.) that he was not estopped from denying the validity of the notice to quit; and (2.) that the Court had no jurisdiction to decide the questions raised in the action in view of the provisions for arbitration contained in s. 16 of the Agricultural Holdings Act, 1923.

Hon. S. O. Henn Collins K.C. and *Guy Aldous* for the appellant (after again arguing the question of estoppel). The jurisdiction of the Court to decide the questions at issue is ousted by the provisions as to arbitration in the Agricultural Holdings Act, 1923, s. 16. By that section, "any question or difference arising out of any claim by the tenant of a holding against the landlord for compensation . . . . and any other question or difference of any kind whatsoever between the landlord and the tenant of the holding arising out of the termination of the tenancy of the holding . . . . shall be determined" by arbitration: s. 54 of the Act has therefore no application here. In *Gas Light and Coke Co.* v. *Holloway* (1) it was held that a claim for compensation by a tenant under the Agricultural Holdings Act, 1883, must be referred to arbitration. In *Lowther* v. *Clifford* (2),

(1) (1885) 52 L. T. 434.

(2) [1927] 1 K. B. 130.

where the provision for arbitration was held inapplicable, the landlords were seeking to recover from the tenant an assessment made on him for making up the road upon which the demised land abutted. There the Court adopted the construction of s. 16 laid down in *Rex* v. *Powell.* (1)

[LAWRENCE L.J. referred to *Olive* v. *Paynter.* (2)]

In *Simpson* v. *Batey* (3) the question whether a notice to quit had been waived was held to be outside the provisions for arbitration in s. 16.

[LAWRENCE L.J. The question whether a proper notice to quit has been given is altogether outside the section.]

The principle of the decision in *Barraclough* v. *Brown* (4) applies here. There it was pointed out by Lord Herschell (5) that " it would be very mischievous to hold that when a party is compelled by statute to resort to an inferior Court he can come first to the High Court to have his right to recover . . . . determined."

[LAWRENCE L.J. In that case there was no provision corresponding to s. 54 of the Agricultural Holdings Act, 1923.]

The only effect of that section is to reserve to the landlord and tenant their common law rights.

Galbraith K.C. and *A. J. Spencer* for the respondent were not called upon.

LORD HANWORTH M.R. This appeal has been argued with great courage and force by Mr. Henn Collins and by Mr. Aldous, who have done all that they possibly can for their clients; but we have come to the conclusion that the appeal fails and must be dismissed with costs.

The claim in the action was for a declaration that a notice to quit given to the plaintiff by the defendant was an effective notice to quit, and alternatively that the defendant was estopped from denying that the notice was a good and effective notice to quit, and that the plaintiff quitted the farm in consequence thereof within the meaning

(1) [1925] 1 K. B. 641.
(2) [1932] 2 K. B. 666.
(3) [1924] 2 K. B. 666.
(4) [1897] A. C. 615.
(5) Ibid. 620.

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of s. 12 of the Agricultural Holdings Act, 1923, and for a declaration that the plaintiff having quitted in consequence of the notice was entitled to compensation subject to and in accordance with the provisions of that Act. The learned judge found in favour of the plaintiff and made the declarations which are to be found in the order, which leave the plaintiff to prove what compensation he is entitled to recover under and by virtue of the terms of the Act of 1923. Bennett J. found himself unable to grant the first declaration, because he held that the notice to quit in question was not valid and effectual at law; but he found in reference to the second declaration asked for, that the defendant was estopped as claimed in that declaration, and it was upon that estoppel that the learned judge founded the plaintiff's right to the relief which he granted him.

The facts are of great importance here. It seems that there was some land called Moreton Hall Estate belonging to a Mr. Eyre in Suffolk, and part of that was a farm of something like 1000 acres called Eldo House Farm, situate close to Bury St. Edmunds, and some other land known as Mount Farm, and as to the important part of the land the plaintiff Farrow was a yearly tenant under a tenancy which had commenced on October 11, 1918; it would therefore be a tenancy within the Agricultural Holdings Act that would be terminable by a notice to quit expiring on October 11 in any particular year. On July 17, 1930, the executors of Mr. Eyre entered into a contract with the present defendant, Mr. Richard Orttewell, to sell him the land which was subject to Mr. Farrow's tenancy. The original date fixed for the completion of the contract was September 15, but in fact it was postponed, and it was not until October 31 that the completion took place and the conveyance of the land was executed. Mr. Orttewell has given evidence that he is a partner in a business of making agricultural implements, being the proprietor of a firm of Dupont & Orttewell, and he lives at Saxmundham House, at Swanage. He tells us also that except for some small holding he had had before, he had not become the owner in fee of any large or considerable area of land previously, and that as there was some uncertainty as to which part of the plaintiff's holding was held under one agreement and which part was held under another agreement, he was minded to give notice to Mr. Farrow to quit. Whatever his reason was, it was the fact that he got Mr. Lacey Scott to draw a notice to quit, and on October 9 he served this notice to quit on the plaintiff. The notice to quit was good in form, and on the face of it could not be contested by the tenant, and there was no reservation upon it or letter accompanying it; it was simply a notice that Mr. Farrow should quit the farms in question on October 11 of the following year. Inasmuch as Mr. Orttewell had not, by October 9, completed the purchase of these farms he was then only the owner in equity and not the legal owner of the farm, and the learned judge has held that he had no right at that time to issue a notice to quit to the tenant. From that decision there is no appeal to this Court. But the learned judge has held that although the notice to quit was invalid in law, yet the circumstances were such that it was impossible for Mr. Orttewell to deny that he had given Mr. Farrow notice to quit, and inasmuch as Mr. Farrow had acted in accordance with it, Mr. Orttewell was estopped from denying that his relationship of landlord to Mr. Farrow as tenant had been severed by the notice, with the consequence that Mr. Orttewell must be regarded as a landlord and Mr. Farrow as a tenant within the terms of the Agricultural Holdings Act, 1923.

It is upon the finding that Mr. Orttewell is estopped that the main argument in this appeal has been addressed to us so strenuously. I must therefore recount the circumstances which are material to this issue. Before the notice of October 9 was served, Mr. Orttewell had been introduced to the plaintiff Farrow by Mr. Lacey Scott as the owner of Mr. Farrow's farm, and thus the landlord under whom Mr. Farrow would continue to hold as tenant. There are a few letters which are of great importance in this case, for there was a sharp issue raised upon the evidence given before Bennett J., and in such a case it is always of importance to look at the documents which passed at the time. The first letter was dated in August, before any notice had been given, and indeed before the personal introduction had been made. That is a letter from Messrs. Lacey Scott & Sons, the agents, to Mr. Farrow: "We have seen the owner of this estate"—that is the Moreton Hall Estate—"and he wishes to give the tenant the first offer of the shooting, and we should be glad to know if you would care to make us an offer for it. We are advertising the shooting to let." Messrs. Woolnough Gross, Son & Chamberlayne were the solicitors acting for Mr. Orttewell, and Mr. Chamberlayne was the partner who had seisin of this matter and was called as a witness at the trial. On January 26, 1931, a letter was written by these solicitors on behalf of the defendant to the plaintiff as follows: "We enclose a letter from Messrs. Witham, Roskell, Munster & Weld"—who had been the solicitors for the vendors—"authorizing you to pay to Mr. Orttewell all rent accruing due as from the 11th October last. We thought probably you would like to have this before settling up with Mr. Orttewell"; and the letter which was enclosed was a letter dated October 31 to Mr. Farrow: "Our clients have sold the Moreton Hall Estate to Mr. Richard Orttewell, of Oakwell, Maldon, Essex, and you should pay your rent of Mount Farm and Eldo House Farm as from the 6th April last, and your rent of the Grazing rights as from the 11th October, 1929, and all future rent to him." On March 9 another letter is written by the same solicitors to Mr. Farrow: "Our client, Mr. Orttewell, has asked us to remind you that the rent due up to Michaelmas last had not yet been paid. We make the amount payable 375*l*. You have probably lost sight of the fact that when Mr. Orttewell completed this matter he had to pay rent up to the 14th September, without having received it from you, and he is, therefore, suffering considerable loss. We shall be grateful if you can let us have a cheque during this week, without fail." It is noticeable, though perhaps no great emphasis need be laid upon it, that the date up to which Mr. Orttewell had to pay rent was referred to as September 14, a date before the date of the notice to quit. The letter does not state what the date was at which Mr. Orttewell became the legal owner of the estate, but it does emphasize the fact that Mr. Orttewell has become the landlord to whom the rent is to be paid; and upon receipt of that letter, or shortly afterwards, a sum of 150*l.* was paid to Mr. Orttewell or his solicitors, and an additional sum shortly afterwards. Then, on March 13, 1931, Messrs. Greene & Greene, acting on behalf of Mr. Farrow, wrote this letter: "Moreton Hall Estate. Our client, Mr. E. S. Farrow, asks us to write to you in this matter. He understands that you are likely soon to sell the Moreton Hall Estate, of the greater part of which he is your tenant, and you will no doubt wish to give vacant possession. Mr. Farrow therefore wishes us to inform you that he has taken another farm, and that he agrees that the notice to quit which you gave him, dated 9th October, 1930, shall be valid, notwithstanding any sale you may make. This is, of course, without prejudice to the claim for disturbance to which the notice will entitle him." The statement that the notice shall be valid was of value and importance, because of s. 26 of the Agricultural Holdings Act, 1923, which says: "On the making of any contract for sale of a holding or any part of a holding held by a tenant from year to year any then current and unexpired notice to determine the tenancy of the holding given to the tenant either before or after the commencement of this Act shall, if the contract for sale is made by the person by whom the notice to quit was given, be null and void unless the tenant has, after the nineteenth day of August, nineteen hundred and nineteen, and prior to such contract of sale, by writing, agreed that such notice shall be valid." The fact that that letter was sent, agreeing that the notice to quit was to stand valid, shows that Messrs. Greene & Greene were properly advising their client. There is no question that that letter was received, and it clearly indicates that Mr. Farrow has taken another farm, and that he is going to make a claim for disturbance in consequence of his leaving under the notice to quit; but no notice of that letter was taken. It was received by Mr. Orttewell and Mr. Orttewell excuses himself, and so far as I know it may be a valid excuse, on the ground that his memory is not very good, that he did not read the letter with any care, and that it was some two months before he placed it in the hands of his legal advisers; but from the point of view of Mr. Farrow the letter had done all that was necessary. It had indicated in clear and unmistakable terms that he was leaving, that the notice to quit was accepted by him as valid and that he intended to make a claim for disturbance. It will be observed that the letter says: "He understands that you are likely soon to sell the Moreton Hall Estate." In the country where people go to market week by week, and have the opportunity of intercourse at the market ordinary, news of matters which affect the holding of tenancies and the transfer or conveyance of land travels quickly; and we know now that a letter was written on March 11 (two days before the letter to which I have been referring) to Messrs. J. D. Wood & Co., the well known land agents, in reference to a proposed contract for the sale by Mr. Orttewell of the Moreton Hall Estate to persons minded to set up in the canning industry, and the letter says this: "With reference to the conversation we had on the telephone to-day with Mr. Hocombe, we herewith enclose draft form of contract for the consideration of the purchaser, and as further mentioned, we had some little difficulty in persuading the vendor to accept this offer as he is not too anxious to sell at the price given, but in the end he agreed"—those lines enshrine what may be called the common form in reference to agents' observations made about their success in persuading a vendor to accept less than he thought he was entitled to; but the letter goes on: "It will be seen that we have referred to the notice to quit given to the tenant by the vendor. This notice was given after the contract was signed by the vendor, but before he was able to complete his purchase, and there is, of course, the question whether such notice is valid, and we have, therefore, had to disclose this fact, but we do not think the purchasers need attach any importance to this fact, because Mr. Farrow, the tenant, has taken a farm the other side of

Bury, some considerable way away, and was actually in this office to-day, and informed us that he intended to have a sale before moving to this new farm. Further, we believe that the proposed purchasers have interviewed Mr. Farrow, with reference to giving vacant possession of some portion of the land at an early date." It is plain, therefore, that not only was Mr. Farrow acting according to the letter of March 13, but the observation that it appeared likely that Mr. Orttewell would be selling a part of the estate of which he was the tenant, was well founded, and that Mr. Orttewell's advisers were satisfied that little danger would arise on the question of the validity of the notice to quit because they were conscious, and so advised the possible purchaser through Messrs. Wood & Co., that Mr. Farrow was acting as a tenant who had received a valid notice to quit would act.

There are one or two more intervening facts before I come to August. It appears that instructions were given, and there was a sale, of some of the cottages which were held and used by Mr. Farrow in conjunction with his holding of the farms on the Moreton Hall Estate; some were sold privately and some at a sale which took place in June, and they were sold because he was moving to a more distant farm. He had verbally agreed on February 3 to take the Gazeley Farm, and on July 31 he signed the contract to take that farm. Then on August 5 Messrs. Greene & Greene enclose in a registered letter a notice of Mr. Farrow's intention to claim compensation for disturbance upon quitting the Eldo House and Mount Farms. Some observations were made as to the delay in making that claim, but they are to my mind ill founded. Mr. Farrow had made plain in the letter of March 13 his intention to make such a claim, and I should have thought that the early part of August was quite the earliest time at which the actual concrete claim could be formulated and sent to the defendant. A copy of that notice was also sent to Mr. Chamberlayne as Mr. Orttewell's solicitor and duly acknowledged. Then on August 8 Mr. Chamberlayne's firm wrote: "Referring to the notice served by you, which we acknowledged in our letter of yesterday.

We have to-day seen our client, who instructs us to notify you that as he was not the owner of the property at the time the notice was served, he was not in a position to give notice, and he cannot admit the claim. We thought it only right to notify you of this fact immediately." I attach importance to that word "immediately," which must mean "as soon as we possibly could," that is, as soon as we were informed that the defendant intended to take the point that on October 9, 1930, he was not in a position to give a notice to quit and meant to dispute its validity. A good reason is to be found for its not having been disputed earlier when the letter is recalled that was written on March 11 to Messrs. J. D. Wood & Co. by Messrs. Chamberlayne, telling them how Mr. Farrow had actually been in their office and informed them that he intended to have a sale before moving to his new farm. To my mind the letter of August 8 indicates that the point as to the invalidity of the notice was then taken for the first time. On August 12 Messrs. Greene & Greene write and put a number of interrogatories, among which the following are to be found: "If Mr. Orttewell was not the owner, why did he sign the notice to quit as owner? On what day did Mr. Orttewell become the owner? If Mr. Orttewell was not the owner on the 9th October, 1930, was the notice to quit given by him with the authority of and on behalf of the actual owners? Why has Mr. Orttewell relet the Eldo Farm and 450 acres to Mr. Marfleet as from Michaelmas, 1931, if the notice to quit is invalid?" and the answers to the earlier inquiries are, "No, he was not the owner, and it was not sent on behalf of the actual owner"; and the answer to the last question is, "It has only been provisionally let . . . . your client is voluntarily leaving these farms." I confess I have grave difficulty in reconciling that statement by Messrs. Woolnough Gross, Son & Chamberlayne with the letter they wrote to Messrs. Wood & Co. on March 11 in that same year. In reply to a further letter of Messrs. Greene & Greene, written on August 14, Mr. Chamberlayne's firm wrote: "We must say further that about a month ago Mr. Farrow was aware that the question now at issue might be raised." Other letters passed which I need not go into. It appears that an agreement had been made on July 21 whereby Mr. Orttewell agreed to let the greater part of the farms to a Mr. Marfleet. He met him at Messrs. Chamberlayne's office, and details were arranged of a very particular nature as to repairs and all sorts of small matters. All this was agreed, and Mr. Marfleet signed the document of July 21 in which "Mr. Orttewell agrees to let and Mr. Marfleet to take 477,823 acres for the term of three years from the 11th October, 1931, at the rental of three hundred pounds per annum the particulars being set out in the plan coloured pink annexed hereto." We are asked to believe that Mr. Marfleet had accepted the position that he was only to take the property if Mr. Farrow went out, so that he was to live in a state of suspense until Mr. Farrow gave up the farms. Such an arrangement would be very unfair to Mr. Marfleet, and I cannot understand why he should accept that position. The agreement to let to him seems really only consonant with the view at that time held by Mr. Orttewell and his advisers that the notice to quit stood good and was being acted upon.

Against all these facts, which point all in one direction and are, as I have shown, confirmed by the written documents, the landlord seeks to rely on certain other matters as showing that Farrow knew at an early date that the notice to quit was bad and that he had no right to accept it, so that in giving up the farms as he did he was acting voluntarily. As I have already pointed out, the documents do not establish that at all. There was until August no notice given to Mr. Farrow to tell him that he was misled, but it was said that from February onwards he knew that the sale to the defendant had not been completed when the notice to quit was given. In this connection conversations which took place between Mr. Chamberlayne and Mr. Farrow in the Corn Exchange soon after the date of the notice to quit are relied on, but I can attach no weight to them. Mr. Chamberlayne agrees in his evidence that he was not authorized at that time to withdraw the notice. He says in his evidence that he had not been dealing himself with the matter of the completion, and later he says: "Whether I be right or wrong that was what I said to Mr. Farrow. Notice to quit could not be given in effect because it had not been completed. (Q.) You do not suggest you had any authority from Mr. Orttewell to make that statement? (A.) Mr. Orttewell lives at Swanage; I do not know. I had not seen Mr. Orttewell. (Mr. Justice Bennett): The notice to quit was not sent from Swanage? (A.) He came over every Wednesday. I had not seen Mr. Orttewell from the time he sent that notice until I saw Mr. Farrow." It is plain enough, and again: "It was quite a casual conversation . . . . with Mr. Farrow, I had no instructions from Mr. Orttewell to say so and, as you say, it was merely a casual conversation, call it gratuitous if you like." The explanation of what passed is that Mr. Chamberlayne, who knew the countryside well and how stupid it was of anybody to get rid of a good tenant, thought it very foolish to turn Mr. Farrow out of the farms. That is far from being a withdrawal of the notice to quit. Thus Mr. Chamberlayne said in evidence: "I had done the best I could to get him to stop; that is in a general way"; and later: "Farrow was an excellent tenant and I did not want him to leave." Again it is said that in February these two gentlemen met at a dance, and neither of them being expert at dancing they had a chat about this matter. Any remark by Mr. Chamberlayne on that occasion was not confirmed in any way, and it ought to have been confirmed if Mr. Farrow was to act upon it. Finally the letters that passed in August were to my mind quite too late.

The general rule in regard to estoppel is laid down by Lord Denman in *Pickard* v. *Sears* (1): "But the rule of law is clear, that, where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at

(1) (1837) 6 Ad. & E. 469, 474.

the same time." In *Freeman* v. *Cooke* (1), which is always associated with *Pickard* v. *Sears* (2), Parke B., afterwards Lord Wensleydale, explains (3) what Lord Denman said: "By the term 'wilfully,' however, in that rule, we must understand, if not that the party represents that to be true which he knows to be untrue, at least, that he means his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth." The estoppel that operates here is one which prevents the defendant from disputing the validity of the notice to quit, for he had to his knowledge caused Mr. Farrow to act upon it and to treat it as a valid notice requiring him to give up the farms in October. It is far too late to say to Mr. Farrow in August, after he has taken another farm and sold his cottages and the stock, that the notice to quit was invalid and that he need not vacate the farms in October. Mr. Farrow had meanwhile been acting on the notice, and Mr. Orttewell could not withdraw from the position that the notice was valid right up until October. He could not alter his attitude after Mr. Farrow had altered his position in consequence of the currency of the notice to quit. That is the answer to the point made by Mr. Henn Collins and Mr. Aldous. There could not be a reorganization of the position between the parties, because the effect of what had happened was that the notice to quit stood good not merely up to August, but right up to the expiration of its currency in October. On the facts the learned judge was not only abundantly justified but absolutely forced to come to the conclusion to which he did. I think if ever there was a case where the doctrine of estoppel applied and was necessary to do justice, it is the present case. I should be sorry to think that, as the result of a technicality raised for the first time in

(1) (1848) 2 Ex. 654. (2) 6 Ad. & E. 469, 474. (3) 2 Ex. 663.

August, 1931, it was not possible for the Court to do justice in this case.

I come now to the further point taken, that the jurisdiction of this Court is ousted by reason of the terms of the Act of 1923, which, by s. 16, provides for arbitration on a large number of questions. I adhere precisely to the judgment which I delivered in *Lowther* v. *Clifford* (1), while taking note of the observations by Scrutton and Sargant L.JJ. in the same case. I think that s. 16 is to be treated as laying down a mode of procedure; and that it does not in any way oust the jurisdiction of the Court, which is preserved, in cases which are not specifically embraced in the arbitration clause, by s. 54. The argument presented to us by Mr. Henn Collins, based on *Barraclough* v. *Brown* (2), breaks down for another reason. Sect. 57, which is the interpretation clause, tells the meanings of the words "landlord" and "tenant" in relation to the Act. Ere ever, therefore, the Act can apply, it must be determined who is the landlord and who is the tenant. I can well understand the question arising here, whether the defendant or Mr. Eyre's executors were the landlords. Equally, a question might arise as to who was the tenant. The question whether the tenancy was terminated by a "landlord" within the meaning of this statute, or whether the notice to quit was given to a "tenant" within the meaning of the statute, or whether the tenant had quit the holding in consequence of a notice to quit within the meaning of the statute, must arise, or may arise, outside s. 16 and outside s. 12, which only applies "where the tenancy of a holding terminates by reason of a notice to quit given by the landlord, and in consequence of such notice the tenant quits the holding." These questions are in regard to matters which lie in limine before the operation of the statute can begin. Equally it seems to me that the jurisdiction of the Court is not ousted, but saved under s. 54, upon the question whether or not there was a notice to quit given and acted upon which cannot be treated otherwise than as valid as between the landlord and the tenant. That is a question

(1) [1927] 1 K. B. 130. (2) [1897] A. C. 615.

which in my view is outside s. 16 and is not submitted to any other jurisdiction than that of the ordinary Courts. Therefore, for the purposes of this case, it seems to me that the jurisdiction of the Court is not excluded by s. 16, and I think that Scrutton L.J. used wise words in *Lowther* v. *Clifford* (1) when he said (2): "Sect. 54 of the Act provides that, except as in this Act expressed, nothing in this Act shall prejudicially affect any power, right, or remedy of a landlord in respect of a contract of tenancy. We have therefore to look for express destruction of the right of the King's subjects to enforce lawful contracts in the King's Courts." In the present case it seems to me that the questions we have got to decide really fall to be tried in the King's Courts and are not expressly reserved for arbitration under the Act.

For these reasons, it appears to me that Bennett J. was right and the appeal must be dismissed with costs.

LAWRENCE L.J. I agree. Having read and carefully considered the correspondence and the shorthand notes of the evidence, I have arrived at the clear conclusion that Bennett J. was right in finding on the facts that the defendant was estopped from denying the validity of the notice to quit which he had given to the plaintiff, and also that the plaintiff had quitted his holding in consequence of that notice. The result of these findings is that the tenancy of the plaintiff's holding was duly terminated on October 11, 1931, and accordingly that the plaintiff was then a tenant entitled to compensation for disturbance within the meaning of s. 12 of the Agricultural Holdings Act, 1923.

With regard to the question of jurisdiction, raised for the first time in this Court, it is enough for me to say that whatever may be the true construction and scope of s. 16 of the Act, the question whether the tenancy had in fact terminated or not is a question which, having regard to s. 54 of the Act, the Court has ample jurisdiction to decide. The appeal, therefore, in my opinion, fails and must be dismissed.

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(1) [1927] 1 K. B. 130.

(2) Ibid. 141.

ROMER L.J. I agree. On the question of estoppel I do not wish to add anything to what has fallen from the other members of the Court, except to say that it appears to me to be the clearest case of estoppel which has come before the Courts for a very long time.

I only wish to add this as to the argument founded upon s. 16 of the Agricultural Holdings Act, 1923. It was said by Mr. Henn Collins that the jurisdiction of the Court in such a matter as this has been ousted by that section. Whatever may be the limitation proper to put upon the operation of that section, and giving for the moment to the section the widest possible operation for which any one has ever contended, I think it plain that the jurisdiction of the Court to decide the issue that had arisen between the parties at the time of the issue of the writ in this action is unimpaired. It is necessary just to glance for a moment at the correspondence that took place in August, 1931, before this action was instituted. We find this phrase in a letter, dated August 12, 1931, from the plaintiff's solicitors to the defendant's solicitors, written after they had been informed by the defendant's solicitors that he contended that the notice to quit was invalid: "If the notice to quit is invalid and Mr. Farrow remains tenant of the Mount and Eldo Farms, he will be involved in very considerable expense and loss," which, of course, was perfectly obvious. It is not denied by the defendant's solicitors, but on August 20 they wrote as follows: "Since writing our letter of the 13th instant, we have taken the opinion of counsel, Mr. Hanbury Aggs, and this is to the effect that the notice which our client signed on the 9th October, 1930, was invalid as a notice to quit or for any other purpose, and that your client's tenancy will continue after next Michaelmas. Accordingly we shall feel obliged by your informing us what your client's intentions are, as if he proposes abandoning the farms, our client will forthwith commence proceedings for a declaration that the notice to quit was invalid and that nothing has occurred to determine the tenancy"; in other words, the defendant was asserting that the relation of tenant and landlord continued to exist as between the plaintiff and himself, involving the plaintiff in liability to pay rent and the other liabilities that fall upon a tenant under a yearly tenancy. How it can be suggested that this Court is precluded from determining whether the defendant's contention in that respect was right or wrong, passes my comprehension. The particular question whether the plaintiff was liable as a tenant after October 11, 1931, has nothing at all to do with the Agricultural Holdings Act.

It was further argued by Mr. Aldous, and I think by Mr. Henn Collins, that even if the learned judge had jurisdiction to make a declaration that the tenancy had come to an end, and that the relationship of tenant and landlord did not continue to exist between the parties after October 11, 1931, yet he was wrong in coming to the conclusion that the plaintiff had quitted the tenancy in consequence of the notice to quit. And it was said that, inasmuch as in August, 1931, the plaintiff was informed that the purchase of the land was not completed until October 31, 1930, it could not be said that the plaintiff left the premises in consequence of the notice to quit. It was indeed suggested by Mr. Aldous that for the purpose of considering whether a tenant leaves in consequence of a notice to quit you must disregard any effect it may have on his mind. The section, he says, does not say: "in consequence of the effect which the notice to quit has on the tenant's mind," but "in consequence of the notice to quit." As I ventured to point out, any tenant who leaves his premises after receiving notice to quit must be leaving in consequence of the effect of the notice to quit upon his mind. If the notice to quit had no effect on his mind, he would not move, and he would eventually be turned out by force. I am not prepared to put a construction upon s. 12 which would confine its operation to cases where a tenant is forcibly ejected at the end of his tenancy. Before August, 1931, the plaintiff had taken other premises, had sold his cottages near the holding he was vacating, had made arrangements for the sale of his stock, and had, I think, bought a blacksmith's shop close to the new

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holding he had taken; he had done all those things, and the estoppel at that time was complete. He did all those things because of and in consequence of the notice to quit, and therefore it necessarily follows that he quitted his holding in consequence of the notice. For these reasons, in addition to those given by the other members of the Court and by Bennett J., I agree that this appeal must be dismissed with costs.

Appeal dismissed.

Solicitors for the appellant: *Kingsford, Dorman & Co., for Woolnough Gross, Son & Chamberlayne, Bury St. Edmunds.*

Solicitors for the respondent: *Whites & Co., for Greene & Greene, Bury St. Edmunds.*

H. C. G.

In re SANDBACH.

ROYDS *v.* DOUGLAS.

[1932. S. 3506.]

FARWELL
J.

1932
Dec. 7, 8.

Will—Bequest of Cumulative Preference Shares—Dividends on Shares in Arrear—Issue by Company of Funded Dividend Certificates, Saleable and Redeemable, in lieu of Payment of Arrears—Whether Income or Capital.

Where dividends on cumulative preference shares are in arrear and the company issues funded dividend certificates, saleable and redeemable, the future profits of the company to be used in redeeming them, in lieu of payment of the arrears, the certificates, as between income and capital, are to be treated as income and belong to the tenant for life.

In re Wakley [1920] 2 Ch. 205 followed.

ADJOURNED SUMMONS.

By his will, dated December 15, 1910, Sandbach appointed executors and trustees thereof, and after giving certain legacies and devises, he bequeathed all the residue of his personal estate, subject to the payment of his funeral and testamentary expenses and debts, to his trustees upon trust to call in and convert, with the fullest power and discretion to postpone the sale, calling in and conversion, and out of the moneys arising therefrom to provide for certain legacies and to invest the residue as therein mentioned and to stand possessed of the residuary personal estate and the income thereof in trust for all such of his children living at his death or born afterwards and of the children then living or born afterwards of any child of his who might have died in his lifetime as being male should attain the age of twenty-four years or being female should attain that age or marry under that age and if more than one as tenants in common per stirpes so that his sons should take in equal shares and his daughters should take in equal shares, but so that the share of each son should be double the share of each daughter, and the testator directed his trustees in the event of any child of his not having at the time of his death attained a vested interest in his or her presumptive share to pay the income arising from any such share to the testator's wife, the defendant Helen Margaret Douglas, until such child should attain a vested interest, and the testator thereby directed that the shares of any females of and in his residuary estate should be settled on such females attaining vested interests in manner therein provided.

By a codicil to his will, dated May 31, 1915, the testator declared that his trustees should stand possessed of his residuary estate upon trust to pay the income thereof to his wife during her life, provided she should so long continue his widow and he declared that the foregoing trust should take priority to the trusts declared in his will of and concerning his residuary estate and after the death or remarriage of his wife, his trustees should stand possessed of his residuary estate, as to both capital and income, upon the trusts and with and subject to the powers and provisions declared of and concerning the same in and by his will.

The testator died on August 10, 1915, leaving his widow him surviving and three children living at his death or born after him—namely, Peter Dundas Sandbach, who was born on October 17, 1907, and attained the age of twenty-four years on October 17, 1931, the defendant Ralph Maxwell Sandbach, born on April 20, 1909, and the defendant Margaret Pamela Sandbach, born on January 11, 1916. The testator's widow intermarried with C. A. O. Douglas on July 31, 1917. By a settlement dated November 8, 1930, Peter Dundas Sandbach assigned to the defendants, John Elmslie Brown, Neville Randall and Angus Chambers Lyell, all his two equal fifth shares or other the share and interest to which he was or might thereafter become entitled of and in the residuary estate of the testator to hold the same, subject to the life interest of Helen M. Douglas, upon the trusts and with and subject to the powers and provisions declared and contained in a settlement, dated January 31, 1929, and made between P. D. Sandbach of the one part and J. E. Brown and Adelaide Mary Sandbach of the other part, as varied by the settlement of November 8, 1930, under which trusts, as so varied, P. D. Sandbach took a life interest in the property.

At the date of his death the testator was possessed of 500 5½ per cent. cumulative preference shares of 5*l.* each in Reffell's Bexley Brewery, Ld., and the trustees, in exercise of the power conferred on them, retained these shares as part of the residuary estate. No dividend had been paid on them since September 30, 1900, to the date of the death of the testator. In May, 1919, a sum of 97*l.* 19*s.* 5*d.* was paid as dividend for the year ending December 31, 1918, out of the profits for that year. In April, 1920, a sum of 96*l.* 5*s.* was paid as dividend for the year ending December 31, 1919, out of the profits of that year. The trustees believed at the time that those sums were paid as arrears of dividends for the years ending September 30, 1901, and September 30, 1902, and consequently appropriated them to capital.

In 1920 the brewery company put forward a scheme for funding the arrears of dividends for the seventeen and a half years for which dividends had not been paid. Para. 1 of the scheme provided that: "The cumulative preferential dividend at the rate of 5½ per cent. per annum upon the preference shares of the company shall in future be calculated as if such dividend had been paid in full down to and including December 31, 1919, and the company shall keep a separate register of the arrears of such dividend accrued down to and including December 31, 1919, which amount to dividends for 17¼ years (hereinafter called 'the funded dividend') and such arrears shall be capable of being transferred apart from the shares to which the same relate and shall be paid or satisfied in the manner provided for by the subsequent provisions of the scheme." The scheme provided for the issue to holders of the funded dividends of certificates for the amounts to which they were entitled. It also provided that the profits of each year, after making provision for certain specified payments and carrying to reserve such sum as the directors might think fit and after providing for the full dividend for the year on the preference shares, should be applied by the directors in accepting tenders by the then holders of the funded dividend certificates at a discount. By an order of the Court, dated May 10, 1920, the scheme was ordered to be submitted to a meeting of the holders of preference shares of the brewery company for approval, with or without modification. At a meeting of the holders of preference shares on June 29, 1920, the scheme was approved without modification. The scheme was finally sanctioned by the Court on July 27, 1920. By a special resolution passed at an extraordinary meeting of the brewery company on June 29, 1920, and subsequently confirmed at an extraordinary meeting held on July 16, 1920, the necessary alterations in the articles of the company for the purpose of carrying out the scheme were made.

In pursuance of the scheme the trustees received a certificate for 2371*l.* funded dividend in respect of the arrears of dividend on the shares. The trustees, believing that the funded dividend was in respect of the arrears for the seventeen and a quarter years immediately preceding December 31, 1919, apportioned it on that basis in the following manner—namely, a funded dividend of 603*l.* to income, which was transferred to the defendant Mrs. H. M. Douglas, and a funded dividend of 1768*l.* to capital, which was retained by the trustees. In June, 1923, Mrs. Douglas sold her 603*l.* funded dividend for 298*l.* 9*s.* 8*d.* to H. Bone, who in July, 1923, tendered it at 52 per cent. to the company. The company accepted the tender and redeemed the funded dividend accordingly. In April, 1932, the plaintiffs, as trustees, tendered to the brewery company their holding of 1768*l.* funded dividend at 60 per cent., which tender was accepted, and the brewery company paid to the plaintiffs the sum of 1060*l.* 15*s.* on April 8, 1932, in respect thereof. Doubts having arisen how the payments above mentioned should be dealt with, the plaintiffs took out this summons, which asked: (1.) Whether the sums of 97*l.* 19*s.* 5*d.* and 96*l.* 5*s.*, or either of them, should be treated as income of the residuary estate or as capital or how the same should be apportioned between income and capital; (2.) whether the moneys secured by or payable in respect of the certificate for 2371*l.* should be treated as income or capital of the residuary estate or whether it should be apportioned between capital and income in proportion to the arrears in respect of years before the testator's death and the arrears in respect of years after his death or in some other and what proportions; (3.) whether, in the event of the moneys secured by or payable in respect of the certificate for 2371*l.* or any part of them being applicable as income, the whole or such part as was applicable as income should be transferred to or held in trust for Mrs. Douglas or whether the same should be divided between her and the defendants, J. E. Brown, N. Randall and A. C. Lyell, in the proportion of three-fifths and two-fifths respectively, or in some other and what proportions or how otherwise the same should be dealt with.

F. H. L. Errington for the plaintiffs.

J. B. Lindon for Mrs. H. M. Douglas. Mrs. Douglas is entitled to the two sums of 97*l.* 19*s.* 5*d.* and 96*l.* 5*s.*, and to the certificate for 2371*l.* funded dividend or the amount realized therefor. There is no case that directly governs the present, but all the cases tend to confirm this contention. The decisive date is the day after the scheme was sanctioned. On that date a contingent right to cumulative dividends disappeared altogether and a new right came into force. That was a right to be paid out of profits: it was an income right: *In re Wakley* (1), where Lord Sterndale M.R. deals (2) with the meaning of the words "interest" and "arrears" as applied to cumulative dividends. *In re Marjoribanks* (3) and *First Garden City, Ld.* v. *Bonham-Carter* (4) tend to support the contention put forward on behalf of Mrs. Douglas. If a dividend had been paid in cash it would have belonged to the then tenant for life. If the company had made a condition that the cash should be used in taking up debentures, those debentures would have belonged to the tenant for life. The certificates are debentures. They have all the necessary characteristics: *Lemon* v. *Austin Friars Investment Trust, Ld.* (5) In *Scottish and Canadian General Investment Co.*

(1) [1920] 2 Ch. 205.
(2) Ibid. 220.
(3) [1923] 2 Ch. 307.
(4) [1928] Ch. 53.
(5) [1926] Ch. 1.

v. *A. Easson* (1) the coupons were saleable; here the certificates are saleable. A tenant for life alive at the date of the declaration of a dividend is entitled to the dividend, although it is not actually paid till after his death. What a company says is capital is capital against all the world. What a company says is income is income against all the world. Here there can be no doubt that the company said that the two dividends paid and the funded dividend certificates were income. The receipt of the certificate for 2371*l.* was the same as being paid in cash, and the whole belonged to Mrs. Douglas: *In re Pennington.* (2)

Franey for the trustees of the settlement of November 8, 1930. The material date is the day when the certificate was redeemed—see judgment of Russell J. in *In re Marjoribanks.* (3) The trustees of the settlement of 1930 are entitled to two-fifths of the 1060*l.* 15*s.*, P. D. Sandbach having attained the age of twenty-four before the redemption. When Mrs. Douglas sold her certificate, the amount she received was capital money, and the trustees are also entitled to the two-fifths of the 298*l.* 9*s.* 8*d.*

J. B. Richardson for the infant children of the testator. These redeemable certificates are entirely different from dividends. Dividends can only be paid out of profits. The certificates are not income to which the tenant for life is entitled, but must go to capital: *In re Armitage.* (4) If the tenant for life has any right, then the sums received for the certificates should be apportioned. The Court is not bound by *In re Wakley* (5) in regard to anything that is not a dividend.

FARWELL J. This summons raises a question that is not without difficulty as to the rights of a tenant for life and the remaindermen in what are called "funded dividends" in a company. [His Lordship stated the facts, and continued:] In 1920 the company put forward a scheme which was described as "a funding dividends" scheme, and that scheme was approved by the Court on July 27, 1920. Para. 1

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(1) (1922) 8 Tax Cas. 265.

(2) [1915] W. N. 333.

(3) [1923] 2 Ch. 307, 312.

(4) [1893] 3 Ch. 337.

(5) [1920] 2 Ch. 205.

of the scheme provided: [His Lordship read the paragraph, and continued:] The effect of that was that the shareholders in the company, by virtue of the scheme, ceased to have any rights, conditional or otherwise, to receive in the future anything in respect of dividends unpaid in the past. In pursuance of that scheme, the necessary alterations were made in the articles of association, and funded dividends certificates were received by the trustees for a sum amounting to 2371*l.* Of that amount the trustees set aside 603*l.* as belonging to the tenant for life and the balance as belonging to capital. In June, 1923, the widow sold her funded dividends certificates for 298*l.* 9*s.* 8*d.*, and in April, 1932, the trustees tendered all the certificates they held for redemption at 60 per cent. The company accepted the tender and paid the trustees the sum of 1060*l.* 15*s.* The question now is whether the moneys so received, 298*l.* 9*s.* 8*d.* by the widow and 1060*l.* 15*s.* by the trustees, or any parts thereof, are capital or income.

The whole position as between capital and income in regard to money paid by a company in respect of past dividends was considered and finally decided, so far as this Court is concerned, by the Court of Appeal in *In re Wakley.* (1) In that case the testator specifically bequeathed certain cumulative preference shares to his son R., and settled his residuary estate upon trust for all his children. At his death in 1905 the dividends on the shares were in arrear and it was not till 1907 that there were any profits available for dividends. In that year an interim dividend was declared, sufficient in amount to satisfy all the arrears upon the shares, and it was held by the Court of Appeal, reversing Peterson J., that the dividend declared in 1907 must be treated as being in respect of that year only: that the Apportionment Act, 1870 (33 & 34 Vict. c. 35), did not apply: and consequently that the whole of the dividend belonged to R. Lord Sterndale M.R. says this (2): "It is necessary therefore to see what is the effect of the provisions as to cumulative dividends. The two views maintained before us may, I think, be stated thus: The respondents'

(1) [1920] 2 Ch. 205.

(2) Ibid. 205, 216–17.

view is that the shareholders acquire a right in each year to a 6 per cent. or 12 per cent. dividend, but that it can be paid only when profits are earned and a dividend declared, and that when the dividend is declared it is declared and paid in respect of each year in which no dividend has been paid. The appellants, however, contend that no right to dividend is acquired at all until profits are made and a dividend declared, and that each dividend is declared in respect of the current year, the shareholder by virtue of the provision that dividends shall be cumulative then, and not till then, acquiring a right to have for that year not 6 per cent. or 12 per cent., but that sum with an addition of the amount of the dividends which they did not receive in the previous years. I think the latter is the correct view. The shareholders, in my opinion, acquire no right to any dividend until there are, in the language of clause 5 of the memorandum, 'profits or other moneys of the company available for dividend which it shall from time to time be determined to distribute.' It was argued that they had an inchoate right which became absolute on the happening of the events mentioned. I am not sure that I understand clearly the nature of an inchoate right, but if there be a right which must be qualified by an adjective I think it is more correctly described as a conditional right, for, in my opinion, it does not arise until the two conditions of the existence of profits and the determination to distribute come into existence. When these conditions are fulfilled the shareholders acquire the right to add to the dividend for the year the same amount for each year in which no dividend has been paid. If this be correct, the dividend which is paid is not in respect of each year but in respect of the year in which profits are declared for division, the amount being by virtue of the cumulative clause determined by the whole amount of dividends unpaid."

That case was followed by Russell J. in *In re Marjoribanks* (1), which perhaps goes a little further. There the directors passed a resolution "to transfer 80,000*l.* from reserve to profit and loss account, and to declare and pay a dividend

(1) [1923] 2 Ch. 307.

of 1*l.* 17*s.* 6*d.* on the preference shares being the equivalent of 3¾ years' dividend on account of arrears." In accordance with the resolution 3150*l.* was paid to the executors of the testatrix, and it was held that the shareholder then entitled to the shares was entitled to the money, that the money was income, and that accordingly the whole passed to the tenant for life.

The position in this case is that if, instead of putting into effect this scheme, the company had been in a position and had available funds to declare a dividend, including the amount unpaid for seventeen years, it is plain beyond argument on the authorities above cited that that sum would have belonged to the widow and there would be no apportionment, although much would have represented dividends unpaid in former years. But the company was not in a position to pay in cash and, accordingly, being anxious to get rid of the conditional rights of the shareholders to payment of the amounts unpaid in past years, if and when funds were available, evolved this scheme, which was approved by the Court and is therefore binding on everybody concerned.

The first thing the scheme does is to put an end to any rights of the shareholders to receive arrears of dividends when funds become available. That right has gone for ever. In its place the shareholders get something in the nature of a debenture. I am not prepared to say that it is a debenture for all purposes: it is a charge, but a charge only upon profits available for distribution. It is in the nature of a debenture, inasmuch as it belongs to the shareholder, who can sell it, or it can be redeemed by the company. On the face of it the certificate says that it is in respect of a funded preference dividend, and it certifies that A. B. is the registered holder of a stated sum of the funded preference dividend, pursuant to the scheme of arrangement, and the conditions printed on the back follow the terms of the scheme of arrangement. That being so, what are the rights of the parties to these moneys? If the company had paid in cash, the tenant for life would have been entitled to the whole of that money. If, instead of cash, the company had offered to discharge their obligations in some other form—e.g., by bonus shares or debentures in another company—I cannot see, on the principle of *Wakley's* case (1), why the tenant for life would not have been entitled to those shares or debentures. The company did not do that, but it gave something in the nature of debentures payable out of future profits, and that debenture was given in consideration of the shareholder giving up whatever conditional right he had in respect of past dividends. It is said against the tenant for life that this is not a payment out of profits for the year 1920, but a charge on profits in future years, and that on the authority of *In re Wakley* (1) these moneys cannot belong to the tenant for life. That in my judgment is not the true view. On principle I can see no difference between these funded dividend bonds, which are given by the company in discharge of their obligation to pay the arrears of dividend at some future date, and the giving of shares in another company to the shareholder in similar discharge. These bonds have been sold or redeemed, and the moneys so realized appear to me on the authority of the cases above cited to belong to the person who would have been entitled to the dividends if the obligation of the company had been discharged in cash —i.e., the tenant for life.

In my judgment, on the true construction of the scheme, the whole of these moneys were properly payable to the widow as tenant for life on July 20, 1920, and I so declare.

Solicitors: *Royds, Rawstorne & Co.*

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(1) [1920] 2 Ch. 205.

P. J. B.

SMITH *v.* EVANGELIZATION SOCIETY (INCORPORATED) TRUST.

[1932. S. 1614.]

C. A.

1932

MAUGHAM J.

Oct. 26, 27, 28.

C. A.

1933

Feb. 16, 17, 20.

Easement—Ancient Light to East Window of Room—Skylights discontinued and East Window enlarged after Eighteen Years—Light to East Window obstructed—Nuisance—Condition of Room Twenty Years before Action brought—Light through Skylights taken into Account—Adequate Light then for ordinary Purposes—Prescription Act, 1832 (2 *&* 3 *Will.* 4, *c.* 71), *ss.* 3, 4.

The burden on a servient tenement cannot be increased by any merely voluntary action of the owner of the dominant tenement.

In an action to restrain interference with light to a window in a room lighted also, at the beginning of the period of twenty years before action brought, by skylights which during that period were blocked up but which though not ancient lights could not have been obstructed except by the action of the owner of the dominant tenement himself, the Court in deciding the issue as to nuisance must treat the skylights as reinstated and will not disregard the vertical light which the skylights would afford, even if it is established that for some purposes of user that vertical light would be unsatisfactory:—

So *held* by the Court of Appeal, affirming the decision of Maugham J.

Colls v. *Home & Colonial Stores, Ld.* [1904] A. C. 179 and *Ankerson* v. *Connelly* [1906] 2 Ch. 544; [1907] 1 Ch. 678 discussed.

WITNESS ACTION.

The plaintiff owned premises consisting of a number of low buildings, including a building separated by a narrow passage on its east side from a hall owned and occupied by the defendants. On the first floor of the plaintiff's building was a room which originally had no roof, and no wall on its west side. In 1905 or 1906 it was given a moderately sloping roof, with a gable the ridge of which ran from east to west, and with two skylights extending from eve to eve over nearly half the roof. In 1922 children of the plaintiff began business as builders, using the room for storage and keeping machinery in it. At a date before 1924 a great part of the west side of the room, hitherto unwalled, was closed in by corrugated iron. The skylights, not having a steep angle, sometimes leaked, and it was decided to abolish them: and in 1924 the existing roof was replaced by a corrugated iron roof with no gable, sloping from east to west, and so placed that it became possible to increase the size of the window to the east, which had before been in the gable angle, by inserting a rectangular window. This was done, and the window gave much more light than the old window, which had been triangular, had given. At that time the room was walled upon the west side, leaving unaltered the part already enclosed by corrugated iron, and a window and a door with glass panels were placed there. About 60 feet away, and adjoining the plaintiff's premises further to the west, was land upon which its owners were entitled to build. In or about July, 1931, the defendants had erected, on the west side of the passage between their hall and the plaintiff's building containing the room, a corrugated iron screen which practically blocked out entirely the light to the east window of the room, and had been painted black on the side facing it.

By this action the plaintiff sought to restrain the defendants from preventing the access of light and/or air to the window, and asked for a mandatory injunction directing them to pull down the screen. The writ was issued on April 20, 1932, and the period within which the plaintiff could have acquired a right to light by prescription would therefore have had to begin, under s. 3 of the Prescription Act, 1832 (1), on April 20, 1912, or possibly, under s. 4 of that Act (2), on April 19, 1913. Expert evidence was given that a building further to the west 62 feet 6 inches high would sensibly affect the light to the window, not leaving enough light in the room for ordinary purposes; that the room, assuming it to be at the date of the writ in this action as it was in 1913, with the skylights in the roof and with the buildings to the west as they were at the date of the writ in this action, would have enough light from the west although it had practically no light from the east; and that the effect on light of the wall to the west being open would be immaterial.

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(1) Sect. 3: "And be it further enacted, that when the access and use of light to and for any dwelling-house, workshop, or other building shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing."

(2) Sect. 4: "And be it further enacted, that each of the respective periods of years herein-before mentioned shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question; and that no act or other matter shall be deemed to be an interruption, within the meaning of this statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof, and of the person making or authorizing the same to be made."

G. P. Slade for the plaintiff. In determining the plaintiff's rights, past user of the room is not material. In *Staight* v. *Burn* (1), it was decided that the plaintiffs, who asked for an injunction to restrain the further building of a wall which obscured light to certain windows, and a mandatory injunction ordering the demolition of as much of the wall as had been built, were entitled to have a light of the same nature as they had had. In *News of the World, Ld.* v. *Allen Fairhead & Sons, Ld.* (2), the plaintiff sought to establish that it was enough to prove that there had been an actionable nuisance before the alterations took place. *Ankerson* v. *Connelly* (3) will be of much assistance to the Court. The only authority on skylights is *Harris* v. *Kinloch & Co.* (4), a decision of Kekewich J.

It must be admitted that the quantum of light to which the plaintiff is entitled through the obscured window must be measured by reference to the other sources of light available at the beginning of the period of prescription, that is, 20 years or 19 years and one day before action brought. The principle applied in *Ankerson* v. *Connelly* (5) is stated in the headnote as follows: "Where before the rebuilding of premises having ancient lights a partial interference with these lights by the owner of the servient tenement would not be sufficient to entitle the owner of the dominant tenement

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(1) (1869) L. R. 5 Ch. 163.
(2) [1931] 2 Ch. 402.
(3) [1906] 2 Ch. 544; [1907] 1 Ch. 678.
(4) [1895] W. N. 60.
(5) [1907] 1 Ch. 678.

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to an injunction, the same amount of interference, even though completely blocking up the remnant of ancient light left after the rebuilding, will not be an actionable wrong to be restrained by injunction." In *Ankerson* v. *Connelly* (1) the defendant pulled down property with ancient lights, replacing it by a larger building, on the same site and some adjacent land, and himself, by another structure, shut out most of the ancient light. In an action by the plaintiffs to restrain the defendant from removing hoardings which shut out the rest of that light, it was held that the defendant no longer had any enforceable right, a decision which the Court of Appeal affirmed on the facts. But in the present case the facts are not so cogent against the plaintiff. A later decision is *Andrews* v. *Waite.* (2) In *W. H. Bailey & Son, Ld.* v. *Holborn & Frascati, Ld.* (3), the principle of *Ankerson* v. *Connelly* (1) was applied: it was held that the owner of a dominant tenement consenting to the lessening of light by building on one adjoining site is not thereby enabled to prevent building on another adjoining site which he could not previously have prevented. The defendants' screen is a nuisance as the plaintiff's building now is, and would have been a nuisance had the building now been as it was at the beginning of the period of prescription. The owner of a building cannot obstruct the light to the windows of a neighbouring building and escape responsibility by showing that the neighbouring building has light from other sources, where it is possible that the other sources may be obstructed: *Sheffield Masonic Hall Co.* v. *Sheffield Corporation.* (4) In the present case the obstruction is not partial but total.

J. W. M. Holmes for the defendants. The Court is entitled to consider the other sources of light to the room. At the beginning of the period of prescription the room had skylights and was entirely open on the west. The cutting off of the light on the east has not affected the room sufficiently to warrant the granting of an injunction. For the purposes of this case the light which came from the skylights must be taken into account. The fact that light from skylights is good for some purposes and bad for others is immaterial. It is good enough for the ordinary purposes of mankind.

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(1) [1907] 1 Ch. 678.
(2) [1907] 2 Ch. 500.
(3) [1914] 1 Ch. 598.
(4) [1932] 2 Ch. 17.

G. P. Slade in reply. The defendants are not entitled to compel the plaintiff to put back the skylights. The question of comfort has to be considered: the room may one day be used as a living room. In this case there has been undue interference with comfort: *Higgins* v. *Betts* (1) is a case in which the authorities dealing with this point are considered. The question whether one whose light has been interfered with can claim to be entitled to light of the same nature as was enjoyed before the interference was dealt with in *Staight* v. *Burn* (2), which was referred to in *Dyers' Co.* v. *King.* (3) It would be extending the principle of all the reported cases to hold that, where a window such as the one in the present case, providing lateral light, has been totally obstructed, there is no remedy because the portion of the room which is affected can receive light from skylights if they are put back.

MAUGHAM J. [after stating the facts:] The skylights, in the view I take of the case, constitute a factor on which the decision in the case must turn, for it has been admitted that, if lights of a similar character to the old skylights were placed in the modern roof of the room—apart from the question whether the light from skylights must be disregarded as being for some purposes unsatisfactory—there could be no nuisance in the sense in which the word is used in considering cases of infringement of light. The problem that I have to determine in this case is further complicated by the position on the west side of the room. At one time there was no wall on the west at all, and there was a chance of anybody using the room inadvertently falling into the yard, which was surrounded by other premises of the plaintiff. A wall of corrugated iron was put up in 1924. The light coming from the west over the plaintiff's premises was unobstructed, because the plaintiff's buildings on the west are so low that the obstruction caused by them is negligible. Some 60 feet or so away third parties, whose property adjoins the plaintiff's premises further to the west, are entitled to build up their own houses, and may very likely exercise their right. Croydon has largely increased in size and population in recent years, and it seems quite likely that premises will be built by these third parties, with a frontage to the High Street, which is not very far away, to a considerable height.

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(1) [1905] 2 Ch. 210.

(2) L. R. 5 Ch. 163.

(3) (1870) L. R. 9 Eq. 438.

It is settled by *Colls* v. *Home & Colonial Stores, Ld.* (1), that, in considering the problem whether there is enough light left for the ordinary purposes of enjoyment of a room, notwithstanding the alleged obstruction by the defendants, it is necessary to take into account the other sources of light which the room possesses, disregarding, however, any light a right to which has not been acquired by prescription, and of which the plaintiff may be deprived at any time. It was having regard to that circumstance that Mr. Waldram, who was called as an expert on behalf of the plaintiff, prepared a section which, I think, accurately shows the position of things as regards the room, so far as concerns the light coming from the west. He sets up an angle of 45 degrees from the ground floor below the room, and assumes the erection of a building 62 feet 6 inches high by third parties to the west of the further part of the plaintiff's premises. There can be no doubt, I think, that such a building might be erected, and that, if it were erected, the light coming through the western window of the room would be sensibly affected. The section shows that in that event the angle of direct light coming through the top of the existing west window of the room would reach table height at, roughly, one-third, or a little further than one-third, of the depth of the room from the window. The Court is in my view bound to treat the question which has ultimately emerged as though the type of hypothetical building which Mr. Waldram has shown on his section had been erected; and then the Court has to consider the effect of the defendants' screen, which virtually blocks out the whole of the light to the reconstructed triangular window in the now non-existing gable on the east, and may have to consider the matter as if the skylights were reinserted in the roof.

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(1) [1904] A. C. 179.

Mr. Waldram gave evidence for the plaintiff, and no evidence was called on the defendants' behalf to contradict it. He stated four things which I propose to accept. First, he said that the room has sufficient light for ordinary purposes from the west, as the building remains to-day, and that although there is practically no light coming from the east; secondly, he expressed the view that, with a building 62 feet 6 inches in height to the west of the plaintiff's premises, taking the room as it is (that is, without the skylights), there would not be enough light for ordinary purposes in the room; thirdly, he said that the effect of the west wall of the room being removed would be immaterial, because he thinks that the light coming through the window looking west is substantially as much as if the whole of the west wall were of glass. Finally, he states his opinion that if the west wall were entirely demolished and a hypothetical building 62 feet 6 inches high were erected at the place which I mentioned, and the two skylights were replaced (or other skylights were put in so as to give the light which was before admitted into the room), the effect of the obstructing screen would be to leave the occupants of the room with sufficient light anywhere near the west window, but to make the occupants of the eastern side rely almost entirely upon the skylights. To those propositions he adds the remark that the light given by a skylight is sufficient for many purposes, while very unsatisfactory for certain other purposes, particularly for clerical work, and he also says that for general purposes, if the skylights were reconstructed, there would in his opinion be sufficient light in the room for the ordinary purposes of mankind. That is, at any rate, what I understood him to tell me in effect, although perhaps not in exact words. If questions of this sort came before a jury, they would be directed in the sense of the issue in *Colls* v. *Home & Colonial Stores, Ld.* (1), where the Earl of Halsbury L.C. said in his judgment: "The test of the right is, I think, whether the obstruction complained of is a nuisance, ... What may be called the uncertainty of the test may also be described as its elasticity." I may be allowed to add that s. 3 of the Prescription Act, 1832, on which the question really turns, says nothing at all on the subject of the quality of light, nor is there any mention of it in *Colls* v. *Home & Colonial Stores, Ld.* (1) In considering the question as to whether the light from the skylights was or is to be treated as unsatisfactory, and ought therefore not to be taken into account, I think I must not disregard the way in which the room has been lighted and used in the past; and I say this without departing from the opinion which I have expressed in *Price* v. *Hilditch.* (2) The present case is one in which, as I have said, the room has been lighted for the greater part of the period of twenty years by skylights, and I think a jury would be directed, in coming to a conclusion on the question whether or not there was actually a nuisance, to bear that circumstance in mind. The room hitherto has practically always been used by builders, and it has been used sometimes for storing various builders' materials and so forth; it has had machinery, such as circular saws, in it, and it has never yet been used for clerical work, although it may be that the plaintiff may desire to use it as an office in future. I should add that I have come to the conclusion that the model prepared by the plaintiff's son and proved before me is accurate, and I am dealing with the questions arising as if, on the questions of fact embodied in the model, the plaintiff had proved her case.

The proposition that the Court must consider the state of the room as it was at the date of the beginning of the period of prescription (that is, in 1912 or 1913) follows from the decision in *Ankerson* v. *Connelly.* (3) In that case

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(1) [1904] A. C. 179, 184, 185.
(2) [1930] 1 Ch. 500.
(3) [1907] 1 Ch. 678, 685.

Sir Gorell Barnes P. said in his judgment: "The result, therefore, is that before these alterations on the dominant tenement the erection which the plaintiffs put up would not have been a legal interference with the rights to light of the dominant tenement; and although, as matters now stand, some light would in fact be cut off by blocking up the space which is left after the alterations which have been made by the defendant, the alterations cannot in fact affect the plaintiffs' rights, because they had that right before to block up to that extent." The decision of Sargant J. (as he then was) in *W. H. Bailey & Son, Ld.* v. *Holborn & Frascati, Ld.* (1) is to the same effect. Counsel for the plaintiff relies upon *Staight* v. *Burn* (2), in which the defendants contended that certain alterations which they had carried out would probably increase the plaintiffs' light by reflecting southern rays of light on to the plaintiffs' windows. In regard to that, Giffard L.J. said (3): "It has been suggested that if the wall is allowed to stand, although there will not be the same direct light, there will be a great amount of reflected light. The answer to that is that the plaintiffs are entitled to have a light of the same nature as they have had." It is true that the learned Lord Justice there refers to "light of the same nature . . . ." a sentence which I think requires qualification. The other case cited on this part of the case was *Dyers' Co.* v. *King* (4) where, however, the plaintiffs had acquired, by means of clearances effected in the neighbourhood by other parties shortly before the defendant's alterations, more light than the defendant's buildings could subtract. On this point I agree with the contention of counsel for the plaintiff that reflected light is altogether different from the light pointed to in s. 3 of the Prescription Act, 1832.

Counsel for the plaintiff was, however, prepared to argue that if the defendants had cut off all light from the east, leaving a sufficient amount of light from the west (their premises being assumed to stand around the plaintiff's premises) there would be a good cause of action; and he says, further, that the more or less vertical light from the skylight is so different in quality from the light coming from a lower angle that I ought not to pay regard to the facts with reference to those two skylights which, for some purposes at any rate, used to give a very large amount of light to the room in question. I am unable to accept that contention, which involves a new view of the implied grant which was in question before the Prescription Act, and derives no support from s. 3, and still less from the case of *Colls* v. *Home & Colonial Stores, Ld.* (1) Looking at the room as a whole, and considering the fact that it is a small room with good window light from the west, I cannot think that a jury could properly come to the conclusion that the room is uncomfortable for the ordinary purposes of mankind. If it should be used as an office, it seems to me the jury might well think (as I think) that the whole of it need not be used for clerical purposes, and that quite a substantial part of the room might be so used, since the office table might be put at the west end of the room. It is a matter of common knowledge that in many towns there are business premises adjoining busy streets where they have excellent light from the street for those portions of the ground floor or first floor rooms which adjoin the street, and where the back parts of the rooms are lighted by skylights; and I have never heard that such premises are not adequately lighted for ordinary purposes. I cannot disregard the skylights, which afforded an admirable light in the room for so long a period during a part of the time of prescription. My conclusion, therefore, is that the plaintiff has not proved her case and that the action must fail.

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(1) [1914] 1 Ch. 598, 601.

(2) L. R. 5 Ch. 163.

(3) Ibid. 166.

(4) L. R. 9 Eq. 438.

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The plaintiff appealed. The appeal was heard on February 16, 17 and 20, 1933.

Fergus Morton K.C. and *G. P. Slade* for the appellant. Maugham J. was wrong to take into account the light from the skylights. They existed only for eighteen years and had ceased to exist before the east window acquired a right to light under the Prescription Act, 1832, s. 3. By 1926 the plaintiff for the first time acquired the right to uninterrupted light through the east window, and when the light was obstructed in 1931 there was no other light in the room to which he had acquired a right. The effect of ss. 3 and 4 of the Prescription Act was for some time in doubt, but the whole matter was cleared up by *Colls* v. *Home & Colonial Stores, Ld.* (1) Under these sections the access and use of light for twenty years gives to the owner of the dominant tenement an inchoate right to light in respect of which an action may be brought to protect it; and an interruption of the light for less than one year will not defeat the right. Here the skylights never became ancient lights, and, as they were done away with before a right to light through the east window was acquired, there was no increase in the burden of the servient tenement. Maugham J. was wrong in taking into account a source of light in respect of which no right to ancient light had been acquired. Thus in *Jolly* v. *Kine* (2) Lord Atkinson said (3): "Of course, in determining whether or not the quantity of the light which the owner of the dominant tenement will, after the obstruction complained of, continue to enjoy is sufficient within the meaning of this decision, regard can only be had to the light which that owner is by grant or prescription legally entitled to enjoy." The light that used to come through the skylights ought not, therefore, to have been taken into account for the purpose of ascertaining whether the obstruction to so much of the east window as was an ancient light deprived the room of sufficient light for the ordinary purposes of mankind. The blocking up of the skylights did not increase the burden on the servient tenement, for a burden cannot be increased until it comes into existence, and at that time no right to light through the east window had been acquired.

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(1) [1904] A. C. 179.

[ROMER L.J. Is there any authority deciding that the Court must look at the state of the room as to light at the beginning of the twenty years and not at the time of the obstruction ?]

(1) [1904] A. C. 179. (2) [1907] A. C. 1. (3) Ibid. 7.

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It is contended not. It is clear that, but for his having taken into account the light from the skylights, Maugham J. would have decided in the plaintiff's favour. If the Court is against the appellant on this point, it still cannot hold that there is no nuisance, having regard to the evidence that a room lit by a skylight commands a less rent and is for some purposes less convenient than one lit by a window. The quality of the light from a skylight diminishes the rental value and its existence does not entitle the servient tenement to block up a side light, even if it leaves sufficient light from the skylight for ordinary purposes. The test is that the plaintiff's reasonable enjoyment has been substantially interfered with. So, too, the plaintiff is not bound to submit to being prevented from developing his property by adding other stories.

Gover K.C. and *J. W. M. Holmes* for the respondents. There is no actionable nuisance in respect of the obstruction to the east window. Mr. Waldram's evidence shows that the room is sufficiently lighted from the west, although if a building of sufficient height was to be erected on that side there would not be sufficient light at the back of the room. The crucial point is whether the skylights ought to be taken into account. If so, the loss of that light would cause an increase in the burden on the servient tenement, as otherwise the room would have been sufficiently lighted for all ordinary purposes without any access of light by the east window. The effect of alterations in the dominant tenement is discussed in *Colls* v. *Home & Colonial Stores, Ld.* (1), and *Ankerson* v. *Connelly.* (2) In the latter case it was held that the defendant had by altering the dominant tenement increased the burden on the servient tenement. That is exactly what the appellant has sought to do here. The right acquired by prescription cannot be increased by anything that the owner of the dominant tenement may do. It is the nature of the enjoyment throughout the twenty years that determines the right acquired by prescription. The Court will not, however, take into account a source of light which can be interfered with: see *Sheffield Masonic Hall Co.* v. *Sheffield Corporation* (1) and *News of the World, Ld.* v. *Allen Fairhead & Sons, Ld.* (2)

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(1) [1904] A. C. 179.

(2) [1906] 2 Ch. 544, 547; [1907] 1 Ch. 678.

[ROMER L.J. It can make no difference whether the light to be taken into account is an ancient light or a light which in fact cannot be obstructed.]

That is so, and here the light through the skylights could not be obstructed except by the appellants' own act. In *Colls'* case (3) Lord Halsbury said that *Warren* v. *Brown* (4) had been rightly decided by Wright J., and it was there pointed out that the measure of the right to light was that which had been uniformly enjoyed for twenty years. The easement acquired is therefore a right to such a quantity of light only as was at the commencement of the twenty years sufficient, with light then being enjoyed without risk of interruption, for reasonable enjoyment; and that right must be enjoyed throughout the period of twenty years. Maugham J. was therefore right to have regard to the position at the beginning of the period and to take into account the light that came from the skylights, which was enjoyed just as if it were an ancient light because it could not be interrupted. The appeal should therefore be dismissed.

Fergus Morton K.C. replied, and referred to *Tapling* v. *Jones*. (5)

LORD HANWORTH M.R. This appeal raises an interesting point on which it appears that there is no direct authority. The facts are simple. In July, 1931, the defendants raised a screen against or close to an eastern window belonging to the plaintiff's house, as to part of which the plaintiff has a right to an easement of light over the defendants' premises, a right acquired during a period of twenty years, which the learned judge has found to commence on April 20, 1912, and a right which the learned judge finds not to have been in any way qualified, still less abandoned, by the alterations made to the eastern window, as a result of which it was much enlarged and made into the form of a parallelogram instead of a triangle.

(1) [1932] 2 Ch. 17.
(2) [1931] 2 Ch. 402.
(3) [1904] A. C. 179.
(4) [1900] 2 Q. B. 722.
(5) (1865) 11 H. L. C. 290, 304.

The premises were altered in 1924, and up to that time there were skylights over the room. It is now lighted from the west by a window and glass panel in a door, but before 1924 the room had not been "fully" enclosed on the western side. The alterations that were made in 1924 in fact improved the room, but took away the skylights through which a large amount of light came to the room. The learned judge held upon the facts, in regard to which he accepted the plaintiff's evidence, that at the present time, if lights of a similar character to the old skylights were placed in the modern roof of the room, then, apart from the possible prejudice derived from vertical as compared with horizontal light, there could be no nuisance caused by the defendants' screen, in the sense in which that phrase is used in regard to ancient lights, especially since the case of *Colls* v. *Home & Colonial Stores, Ld.* (1)

The evidence about the present condition of the premises, which was accepted by the learned judge, stands in this way. He recalls that Mr. Waldram, the expert called for the plaintiff, stated four things which I propose fully to accept. First, he said that the room has sufficient light for ordinary purposes from the west, as the building remains to-day, and that although there is practically no light coming from the east. [The learned judge then referred to two other statements of Mr. Waldram, and then continued :] Finally he states his opinion that "If . . . . the two skylights were replaced or other skylights were put in so as to give the light which was before admitted into the room the effect of the obstructing screen would be to leave the occupants of the room with sufficient light anywhere near the west window, but to make the occupants of the eastern side rely almost entirely upon the skylights." To those propositions he adds the remark that the light given by a skylight is sufficient for many purposes, while very unsatisfactory for certain other purposes, particularly for clerical work: and he also says that, for general purposes, if the skylights were reconstructed there would, in his opinion, be sufficient light in the room for the ordinary purposes of mankind. And the learned judge on that holds that the room would be adequately lit for ordinary purposes if there were skylights still existing, and no nuisance could arise.

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(1) [1904] A. C. 179.

Mr. Morton, as a subsidiary point, has called our attention to the fact that to certain intending tenants the vertical light might not be as satisfactory as a horizontal light, and it may be, indeed there is some evidence, that a lesser sum would be obtained as the annual value of the premises if it enjoyed vertical light as against horizontal light. But there was really no evidence that for ordinary purposes and for what may be called the major part of intending tenants, the light was not satisfactory. The learned judge does not find that in fact there has been any diminution in value, and I think we must accept what the learned judge has found to the full—namely, that if the skylights were reconstructed, there would be sufficient light in the room for the ordinary purposes of mankind, using that phrase in the sense required by the decision in *Colls* v. *Home & Colonial Stores, Ld.* (1)

That being so, we have to consider what is the effect of the alterations which were made by the plaintiff in 1924. In *Colls'* case (1) Lord Halsbury uses the following words (2), which were quoted by the learned judge below : " The test of the right [to light] is, I think, whether the obstruction complained of is a nuisance, and, as it appears to me, the value of the test makes the amount of right acquired depend upon the surroundings and circumstances of light coming from other sources, as well as the question of the proximity of the premises complained of. What may be called the uncertainty of the test may also be described as its elasticity." It would seem quite plain from those words that we have to take into account the light which was coming through the skylights as well as the light which was coming through the eastern window. Lord Macnaghten said this (3) : " It was not sufficient to constitute an illegal obstruction, that the plaintiff had, in fact, less light than before ; nor that his warehouse, the part of his house principally affected, could not be used for all the purposes to which it might otherwise have been applied. In order to give a right of action, and sustain the issue, there must be a substantial privation of light, sufficient to render the occupation of the house uncomfortable, and to prevent the plaintiff from carrying on his accustomed business"; and Lord Davey says (1): "It does seem to me unreasonable to hold that where a man for his own convenience or profit converts two or more rooms of his house into one without making provision for lighting them, or converts a portion of his house into a photographic studio, or puts it to some similar purpose, he can suddenly call upon his neighbour to leave him a supply of light which is rendered necessary only by such alterations, and thereby impose what is in substance and in truth an increased burden on his neighbour." It is quite true that those observations of Lord Davey may be attributed to the facts as they were in *Colls'* case (2), but the reasoning seems to apply in a case where the plaintiff alters the condition of his premises and deprives himself of a certain quantum of light during the period of twenty years before the commencement of the action which has to be considered. These passages that I have quoted from the speeches of Lord Halsbury and Lord Macnaghten clearly indicate that a plaintiff who has acquired a right to light does not obtain a right to a quantum of light measured absolutely, but to a quantum of light measured relatively.

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(1) [1904] A. C. 179.

(2) Ibid. 184, 185.

(3) Ibid. 187.

In the present case there were skylights until 1924, and starting in 1913, the light from the eastern window was relatively unimportant. What, then, has been gained by prescription during the twenty years? As Lord Halsbury said in *Colls'* case (3): "there has been a complete uniformity of decision upon the construction of the statute that it has made no difference in the right conferred, but is only concerned with the mode of proof; but, though I quite concur with this construction, which is supported by an overwhelming body of authority, yet I cannot but think the language of the statute has led to some of the decisions which your Lordships are now called upon to review." Now what is it that a plaintiff gains by the lapse of the twenty years? He gains, when proof is given, the right to light; but s. 3 of the Prescription Act, 1832, says: "when the access and use of light to and for any dwelling house . . . . shall have been actually enjoyed therewith for the full period of twenty years": it is not merely the access, but the use of the light which must be proved to have been enjoyed, and when that proof has been given, the right to the access and to the use is to be deemed absolute and indefeasible. It seems clear that consideration must be given to the condition of the premises at the commencement of the period of twenty years. It does not seem possible that by an increasing use of light during the twenty years a plaintiff can gain a right to the maximum amount of light used. The Court has to consider what was the access and the use of light which has been actually enjoyed for the full period of twenty years, and that seems to carry one back to the condition of the premises as they stood at the commencement of the twenty years, in accordance with the rule laid down by Lord Halsbury, that one has to consider the surroundings and circumstances of light coming from other sources. In the words of Lord Cranworth in *Yates* v. *Jack* (1), which Wright J. quoted in *Warren* v. *Brown* (2)—a case which Lord Halsbury says in *Colls*' case (3) was correctly decided: "'When the full statutory time is accomplished, the measure of the right is exactly that (neither more nor less) which has been uniformly enjoyed previously.'" That word "uniformly" seems of importance, and indeed is indicated by the terms of s. 3 of the Prescription Act. It seems to me that Maugham J. has followed that reasoning and the principle and the statements in the speeches in *Colls*' case (3) accurately and correctly; and more than that, he has adopted the reasoning of

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(1) [1904] A. C. 203.

(2) [1904] A. C. 179.

(3) Ibid. 183.

(1) (1866) L. R. 1 Ch. 295.
(2) [1900] 2 Q. B. 722, 729.
(3) [1904] A. C. 179, 185.

Warrington J. (as he then was) in *Ankerson* v. *Connelly* (1) and of the Court of Appeal (2) to which that case was afterwards taken. It is said that *Ankerson* v. *Connelly* (2) does not provide an authority in the present circumstances, because the Court were there dealing with rights which had already been acquired by the lapse of the twenty years; but the reasoning to which I have already referred in *Colls'* case (3) seems to be the same reasoning which was adopted in *Ankerson's* case (2), and quite apart from the question whether the right was an inchoate right or one which had been perfected by the lapse of time. Warrington J. said this (4): "The defendant having shut out from his window all the light from the west, which previously he enjoyed, all the light from the north, the whole of the vertical light from the sky, and all the light from the east except that which comes through the only aperture which is material, that is the gap, has brought about this effect, that a building erected on the servient tenement which, before the alteration of the dominant tenement, would not have been a legal interference with the claim of the dominant tenement would now be such an interference"; and he holds that such an alteration by the plaintiff cannot, I will not use the words "increase the burden," but make more essential the right which he now claims.

In the Court of Appeal (2) there are passages which to my mind are of importance. Lord Cozens-Hardy says this (5): "It is no longer sufficient for a plaintiff to say, 'Oh, you are depriving me of a portion of light, and a portion of light which is so obviously important to me—because it is the only light which I by acts of my own have chosen to leave to my own premises—that I am entitled to an injunction.'" And later he says (6): "In a case like that it seems to me that when the defendant"—the defendant in that case was the owner of the right—"by his own act has blocked out practically the whole of the light which the room had before, it does almost necessarily and inevitably follow that the obstruction (even the complete obstruction) of the small remnant of light which remained would not by itself have been an actionable wrong in respect of the old light to the premises, and that, I think, is the view which the learned judge really took." Sir Gorell Barnes, as he then was, said (1): "The result, therefore, is that before these alterations on the dominant tenement, the erection which the plaintiffs put up would not have been a legal interference with the rights to light of the dominant tenement; and although, as matters now stand, some light would in fact be cut off by blocking up the space which is left after the alterations which have been made by the defendant, the alterations cannot in fact affect the plaintiffs' rights, because they had that right before to block up to that extent."

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(1) [1906] 2 Ch. 544.
(2) [1907] 1 Ch. 678.
(3) [1904] A. C. 179, 185.
(4) [1906] 2 Ch. 547.
(5) [1907] 1 Ch. 682.
(6) Ibid. 683.

There is really no trace in that case of the reasoning depending upon the completed acquisition of the rights. The test is derived from a proper application of *Colls'* case (2), and the observations that are made in *Colls'* case (2) are to the effect that one must look upon the surroundings and the circumstances of light coming from other sources.

It appears to me that the learned judge has properly directed himself in accordance with those observations, and he has come to the conclusion that if the plaintiff herself had not added to the necessity of this light coming from the eastern window, there would be no need for that light; that as the premises stood at the commencement of the period of twenty years they were abundantly lighted, and no nuisance would have been caused by the blocking up of the portion of the eastern window which has acquired a right to ancient light. Under those circumstances he finds that the premises in their condition at the commencement of the twenty years were sufficiently lighted, that no nuisance was created by what has been done by the defendants in that sense, and on that ground he held that the action was not maintainable.

(1) [1907] 1 Ch. 685.

(2) [1904] A. C. 179.

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For the reasons which he gave, and for those which I have ventured to add, I think he was right, and the appeal must be dismissed with costs.

LAWRENCE L.J. The question in this case is whether Maugham J. was right in holding that, for the purpose of determining whether the screen erected by the defendants constitutes an actionable nuisance, he ought to have regard to the condition of the room in question as it existed at the commencement of the period of prescription or whether he ought to have regard to the present altered condition of that room.

At the commencement of the period of prescription, in 1912 or 1913 (it is immaterial to determine which of those two dates is the correct one), the room, which measures 19 feet in breadth from east to west, and 24 feet in length from north to south, was lit on the east side by a window containing a superficial area of 30 square feet, and on the west side by an opening along the entire length of the room from the floor to the ceiling. In addition to this window and opening, the room had two skylights running across the room from the ridge to the eaves on both sides of the roof. In these circumstances the learned judge found as a fact that if the screen had been erected at the commencement of the period of prescription it would not have constituted an actionable nuisance, and I agree with that finding.

During the period of prescription the plaintiff made certain alterations to the room substantially affecting the light coming to it. In 1916 she partly closed the opening on the west side with corrugated iron sheeting, and in 1924 she altered the roof, entirely doing away with the skylights, and closed up the remaining part of the opening on the west side, placing a window and a door with glass panels in the part so closed up. At the same time the plaintiff enlarged the window on the east side by about 13 square feet.

The learned judge has found as a fact that the screen erected by the defendants substantially darkens the room in its altered condition and would constitute an actionable nuisance, if regard is to be had to that condition. I also agree with that finding. It is clear from the judgment of the learned judge that in arriving at his findings of fact he fully recognized that since *Colls*' case (1) the Court, in considering whether an obstruction to the access of light constitutes an actionable nuisance or not, must have regard to other sources of light which the room possesses, disregarding, however, any access of light of which the plaintiff may be deprived at any time. In reaching his conclusion on the main point of this case—namely, that the issue of actionable nuisance or no actionable nuisance at the end of the period of prescription falls to be determined according to the conditions prevailing at the commencement of that period, the learned judge has relied upon the principle recognized by the House of Lords in *Colls*' case (1) and by the Court of Appeal in *Ankerson* v. *Connelly* (2), that the owner of the dominant tenement cannot by any act of his own during the period of prescription impose a new burden upon his neighbour. In my opinion the cases upon which the learned judge has so relied are distinguishable from the present in that there the owner of the dominant tenement had made the alterations after having acquired an easement over the servient tenement, and not, as in the present case, where the alterations were made before any easement had been acquired by him. For myself, I very much doubt whether the principle recognized and applied in those cases has any application to a case where the alterations are made before any easement has been acquired over the servient tenement, and where the alterations cannot be said to have increased the burden on the servient tenement.

In my opinion the true principle upon which this case ought to be decided is that, as the right to the access of light which the owner of the dominant tenement acquires under s. 3 of the Prescription Act, 1832, is measured by the amount of light actually enjoyed throughout the whole of the period of prescription, so the freedom from nuisance, to which the owner of the dominant tenement becomes absolutely and

(1) [1904] A. C. 179. (2) [1907] 1 Ch. 678.

indefeasibly entitled under the section at the end of the period of prescription, must be measured by and be the same as the freedom from nuisance which the dominant owner was in fact enjoying at the commencement of that period. It follows, in my judgment, that the right of the dominant owner cannot be enlarged by any alteration in his tenement during the period of prescription. In my opinion that view is confirmed by the passage from the judgment of Wright J. in *Warren* v. *Brown* (1), referred to by the Master of the Rolls.

Applying that principle to the facts of the present case, I am clearly of opinion that the learned judge was right in mentally reconstructing the premises and the surroundings as they existed in 1912 and 1913, and taking into account the access of light through the skylights and through the opening on the west side of the room enjoyed by the plaintiff at the commencement and during the greater part of the period of prescription.

The enjoyment of that access of light was not precarious, and could not, against the will of the plaintiff, have been obstructed to such an extent as to render the room unfit for the ordinary purposes of inhabitancy or business according to the ordinary notions of mankind, having regard to the locality and to the surroundings.

A novel contention, however, was raised by Mr. Fergus Morton on behalf of the plaintiff—namely, that the light coming through a skylight is of a different and inferior quality to that coming through a window in the side wall of the room; and in support of that contention he referred to cases in which the Court has drawn a clear distinction between direct light and reflected light, and has held that it is no answer to a claim by a dominant owner to restrain the obstruction of the access of direct light to his tenement for the servient owner to say that after that obstruction there will be sufficient reflected light left. In my opinion those cases have no application to the facts of the present case. There is no analogy between reflected light and the

(1) [1900] 2 Q. B. 722, 729.

direct light coming through a skylight into the room. Apart altogether from the fact that the window which has been obstructed in the present case by the screen was close to the ceiling of the room, and therefore approximated closely to a skylight, there is nothing in this contention. Although light coming through a skylight enters a room at a different angle from that at which light coming through a side window enters it, the light is nevertheless direct light, and it is of the same, if not of a better, quality than the light coming through a side window.

The suggestion that a man commits an actionable nuisance by obstructing the access of light through a window on the east side of his neighbour's room, when that room is already abundantly lighted by a large opening on the west side and large skylights in the roof, because the light coming through the skylights is of a different quality from that coming through the east window, is certainly a novel one, and one which, in my judgment, is not well founded.

For the reasons stated, I agree that this appeal fails, and ought to be dismissed with costs.

ROMER L.J. Sect. 3 of the Prescription Act, 1832, enacts "That when the access and use of light to and for any dwelling house, workshop, or other building shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing." That Act was passed in the year 1832, and until the year 1904 there were many persons, including some persons of great eminence, who thought that in enacting that section the Legislature meant what it said; and accordingly they thought, and in some cases held, that where light over the servient tenement had been received by the dominant tenement for the period mentioned in that section, the owner of the dominant tenement acquired a right to receive that light without substantial diminution. It was, however, held in *Colls'* case (1) by the House of Lords that that is by no means the meaning or effect of that section, and that all that the dominant owner gets after his twenty years' enjoyment is a right only to receive so much light over the servient tenement as is essential for the comfortable enjoyment of the dominant tenement according to the ordinary usages of mankind. The result of that, of course, is that if the dominant tenement can be so comfortably enjoyed without the use of any light coming over the servient tenement, he obtains, notwithstanding the words of the Act, no right whatsoever to the light that he has been enjoying for the twenty years.

Of course, the result of that decision, or one of the results of that decision, is that it is necessary to consider, in any action brought for the obstruction of an ancient light, what other lights are possessed and enjoyed by the owner of the dominant tenement, and not only must it be ascertained what lights he is enjoying at the date of action brought, that is to say, at the end of the period of twenty years, but also what lights he enjoyed at the commencement of the period; for the right acquired must be measured by the enjoyment over the twenty years. Supposing at the commencement, for instance, of the twenty years, the dominant tenement is receiving light over the servient tenement through a big window, and that after five or six years the owner of the dominant tenement reduces the size of that window: reducing the size of the window means, of course, that he will require more light for the comfortable enjoyment of his premises through the space occupied by the smaller window than he was receiving before through that space, because the bigger window could have been obstructed to a larger extent than it would be now possible to obstruct the smaller window, and yet leave sufficient light for the comfortable enjoyment of the dominant tenement. But the owner of the dominant tenement does not, by reason of the alteration, get a right at the end of the twenty years to any further light than he was enjoying at the beginning of the twenty years—not because by diminishing the size of his window he is enlarging the burden borne by the servient tenement, because at the time no burden at all is being borne by that tenement, but because at the end of the twenty years he will not have enjoyed that additional light for the necessary period, he will only have enjoyed it for fifteen years.

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(1) [1904] A. C. 179.

For these reasons, in my opinion, Maugham J. was not only justified in considering, but was bound to consider, what lights were being enjoyed by the room of the plaintiff that is in question in this action at the commencement of the twenty years, that is to say, on April 20, 1912. At that time, as has been pointed out, the room was not only receiving light through a window on the east, which was in the same position as part of the present window on the east, but it was also receiving light through skylights. It is said by Mr. Fergus Morton that the light through the skylights should be disregarded for the purpose of measuring the enjoyment at the beginning of that period, because the plaintiff had no prescriptive right at that time to the light coming through the skylights, and because it has been said that light to which there is not a prescriptive right can be disregarded in considering the light actually enjoyed at the beginning or at the end of the period. That, however, is not the law. What Lord Lindley stated in *Colls'* case (1) was this: "As regards light from other quarters, such light cannot be disregarded; for, as pointed out by James V.-C. in the *Dyers' Co.* v. *King* (2), the light from other quarters, and the light the obstruction of which is complained of, may be so much in excess of what is protected by law as to render the interference complained of non-actionable. I apprehend, however, that light to which a right has not been acquired by grant or prescription, and of which the plaintiff may be deprived at any time, ought not to be taken into account." So that it is not all light to which a right has not been acquired by grant or prescription that is left out of account, but only the light of which the plaintiff may be deprived at any time.

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(1) [1904] A. C. 210.

(2) L. R. 9 Eq. 438.

The question, therefore, which Maugham J. had to decide was whether he was entitled to take into consideration the light coming through the skylights as being light of which the plaintiff could not be deprived, and he obviously, and in my opinion rightly, arrived at the conclusion that that was light of which, in fact, the plaintiff never could be deprived, except by his own action; and, of course, if a plaintiff deprives himself by his own action of light of which he could not otherwise be deprived, he has only himself to thank. Maugham J., taking into consideration the light coming through those skylights, has arrived at the conclusion that but for their removal by the plaintiff himself, there would, notwithstanding the erection by the defendants of the screen blocking out the light from the east window, be enough light left for the comfortable enjoyment of this room according to the ordinary usages of mankind. On the evidence given by Mr. Waldram, he was, in my opinion, abundantly justified, and indeed bound to come to that conclusion. On the first point, therefore, raised by Mr. Fergus Morton upon this appeal, the learned judge, in my opinion, was right.

As regards the second point to which Mr. Fergus Morton directed our attention, and indeed, on which he insisted in his reply, I think the learned judge again was right. The point was this. Mr. Fergus Morton says that even if you do take into consideration the existence of the skylights, yet nevertheless the light from them is so different from the light formerly coming through the east window that it ought to be disregarded. The light, however, is not different in quality, and all that can be said about it is that Mr. Waldram agreed that it was not suitable for clerical work, and that if the eastern window were blocked up and the plaintiff had to reopen the skylights and rely upon the light coming through them for the purpose of lighting the east end of his room, the room would not fetch such a high rental. But, in considering the question of obstruction of ancient lights, we have nothing to do with the diminution in rental value of houses. I doubt whether, since *Colls'* case (1) was decided, in any case in which an obstruction of an ancient light has been held not to be actionable, there has not been a diminution in the rental value of the dominant tenement; because people are willing to pay higher rents for property which is in possession of light in excess of the minimum required for comfortable enjoyment of a house; in other words, people are willing to pay higher rents for luxuries, and excess of light over that required for the comfortable enjoyment must now be regarded, even in the case of ancient lights, as a luxury.

For these reasons, it appears to me that the decision of Maugham J. on both points was right and that this appeal must be dismissed.

Appeal dismissed.

Solicitors: *Oldman, Cornwall & Wood Roberts*; *Lydall & Sons.*

(1) [1904] A. C. 179.

H. C. G.

Followed. Re Kris Cruisers, Ld. [1949] 1 Ch. 138

C. A.
1932
EVE J.
Nov. 3, 4, 16.
C. A.
1933
Feb. 24, 27, 28.

In re M. I. G. TRUST, LIMITED.

[No. 00229 of 1931.]

Company — Winding-up — Fraudulent Preference — Mortgage by Deposit of Deeds—Failure of Mortgagees to register Mortgage with Registrar of Companies—Application for Extension of Time—Notice to and Appearance by Company—Withdrawal of Opposition to Application—Order made to extend Time—Form of Order—"Judicial proceeding taken or suffered "—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 44—*Companies Act,* 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *ss.* 79, 80, 85, 265.

A company having deposited the title deeds of certain real estate together with a memorandum of charge with another company in part security for a loan, the mortgagee company by inadvertence omitted to register the charge within twenty-one days, and about ten months later applied to the Court to extend the time for registration, and served notice of the motion upon the mortgagor company. At that date the mortgagor company was hopelessly insolvent, and a petition for its winding-up was impending. The company appeared by counsel, who was instructed to oppose the motion, which was adjourned without any of the relevant facts having been brought before the Court. Six days later the motion came on again, and the opposition of the mortgagor company having been withdrawn, the order extending the time for registration of the mortgage was made. It afterwards appeared that instructions to withdraw the opposition had been sent to the company's solicitors by the sole continuing director of the company, who was also one of the directors of the mortgagee company and who and whose family were large shareholders in both companies. Shortly after the order for extension of time was made, the mortgagor company was ordered to be wound up compulsorily on its own petition. On a summons taken out by the liquidator :—

Held, by Eve J., that the company by withdrawing its opposition to the motion for extension of time had suffered a judicial proceeding when unable to pay its debts within s. 44 of the Bankruptcy Act, 1914, and that this act amounted to a fraudulent preference of the mortgagee company within s. 265 of the Companies Act, 1929, and therefore the registration of the charge ought to be declared to be void against the liquidator.

On appeal :—

Held, by the Court of Appeal (reversing the decision of Eve J.), that assuming the action of the mortgagor company was an " act relating to property " within s. 265 of the Companies Act, 1929, and that such an act amounted to a " judicial proceeding suffered " by the company within s. 44 of the Bankruptcy Act, 1914, it was not shown to the satisfaction of the Court that the dominant motive of the mortgagor company in its action was to prefer the mortgagee company. It was the duty of the mortgagor company, under s. 80 of the Companies Act, to send particulars of the charge for registration, and registration by either company having been omitted, the directors and officers of the company became liable to heavy penalties under s. 80, sub-s. 3, if no order under s. 85 extending the time were made. The mortgagor company therefore was under a duty to repair its omission and to withdraw its opposition, and that being so it could not be said to have acted with a view to create a fraudulent preference.

In re Cohen [1924] 2 Ch. 515 discussed and explained and headnote stated to be inaccurate.

The usual proviso added to an order for extension of time for registration under s. 85—namely, that the order is to be without prejudice to the rights of parties acquired prior to the date of actual registration—only protects creditors who have acquired a security on the property the subject-matter of the charge. The Court will not insert in the order any terms for the protection of unsecured creditors of the company.

Statement by Buckley J. in *In re Cardiff Workmen's Cottage Co.* [1906] 2 Ch. 627, 630, to the effect that in orders extending the time for registration provisions ought to be inserted, at any rate, in certain cases, protecting the unsecured creditor, dissented from by Romer L.J.

SUMMONS IN WINDING-UP.

The summons was taken out by Sir Harry Peat, the liquidator of the M. I. G. Trust, Ld. (hereinafter called " the company "), asking for a declaration that the company by withdrawing its opposition to an application for extension of time to register a mortgage which it had created had suffered a judicial proceeding which amounted to a fraudulent preference of its creditors, the mortgagees.

On May 6, 1930, the company deposited the deeds of three farms at Market Bosworth, Leicester, valued at 25,000*l.*, with the Gresham Trust, Ld. (hereinafter called " the Trust"), as part security for a loan, together with a memorandum of deposit in which the company undertook to execute any necessary deed when called upon to do so. The mortgage was not registered within twenty-one days with the Registrar of Companies in compliance with s. 79 of the Companies Act, 1929. On March 6, 1931, an application was made by the Trust to the Chancery Division under s. 85 of the Act to extend the time for registration on the ground that the failure to register was due to inadvertence. The secretary of the Trust in his affidavit said that the mortgage being an equitable charge, he did not realize that registration was necessary.

Notice of the motion to extend the time was served on the company, and counsel was briefed on behalf of the company to oppose, and appeared on the first hearing of the motion on March 6. The motion was adjourned to March 10 for further evidence. When it came on again, there was no opposition, and Maugham J. made the order extending the time for registration. The mortgage was duly registered on March 10. The opposition was withdrawn on the instruction to the solicitors of Mr. A. F. P. Wheeler, the managing director, who was also a director of the Trust. The company was originally formed in 1910 by Sir Arthur Wheeler (then Mr. Arthur Wheeler) for the purpose of dealing in stocks and shares and property of all kinds. Sir Arthur Wheeler and his family were largely interested both in the company and the Trust.

At the date of the above proceedings the company was insolvent, with heavy liabilities, and on March 31, 1931, an order was made on its own petition for compulsory liquidation. On March 3 a receiving order was made against the firm of Arthur Wheeler & Co., of which Sir Arthur Wheeler was the senior partner, and they were adjudicated bankrupt on the same day.

Millard Tucker K.C. and *H. M. Pratt* for the liquidator. On March 6, 1931, when the application was made to extend the time for registration of the charge, the applicant had to show that there was no winding-up petition against the company impending, and no judgment which remained unsatisfied. At that date Mr. A. F. P. Wheeler desired that the position of the company should be brought to the attention of the Court, but during the interval over which the application was adjourned, a letter was sent by the company to the Trust intimating that all opposition to the extension of time was withdrawn. The Trust had notice of the position through the common directorship of A. F. P. Wheeler of the company and the Trust.

The withdrawal of opposition in the circumstances of the case was a fraudulent preference of the Trust by the company, under s. 265 of the Companies Act, 1929, and s. 44 of the Bankruptcy Act, 1914. It is sufficient to show that there was a judicial proceeding suffered by the company, that the company was insolvent—a fact which is admitted—that had the company not suffered the proceeding the order which the creditor obtained would not have been obtained, that the object of the proceedings was to prefer the creditor, and that their effect was to do so: see *Ex parte Lancaster.* (1)

The company was hopelessly insolvent on March 4 when the application was made, and the Trust knew through its agents, the common directors, that it was insolvent. The order for extension of time for registration is always made without prejudice to the rights of creditors previously acquired: *In re Joplin Brewery Co.* (2); *In re S. Abrahams & Sons* (3); *In re Anglo-Oriental Carpet Manufacturing Co.* (4); and *In re Cardiff Workmen's Cottage Co.* (5)

The Court will not necessarily impose any terms for the protection of unsecured creditors, if the debtor company is in a sound financial position. Here it is impossible to say what Maugham J. would have done had he known the true facts. A balance-sheet had been submitted by the company's auditors which showed that there were 224,000*l.* worth of securities belonging to the company controlled by the Wheeler family.

These proceedings would not have resulted in the order which was made for extension of time, if the company had done its duty and let the facts come before the Court. If the result of what was done, or left undone, was in fact a preference of a particular creditor and there is no other explanation available, then the intention to prefer is presumed from the facts: *In re John Drage & Sons.* (6)

C. E. E. Jenkins K.C. and *A. P. Vanneck* for the Gresham Trust. The Trust's application for extension of time was for its own protection, and not against the company. The company could have no argument against the mortgage

(1) (1883) 25 Ch. D. 311, 317.
(2) [1902] 1 Ch. 79.
(3) [1902] 1 Ch. 695.
(4) [1903] 1 Ch. 914.
(5) [1906] 2 Ch. 627.
(6) (1926) 134 L. T. 765.

being registered. It is admitted that the Trust obtained an advantage by the order for extension, but they did not get that advantage by reason of anything suffered by the company.

Upon being satisfied that the omission to register the mortgage was due to the inadvertence of the Trust, Maugham J. was bound to make the order for extension. There was no potential right in the creditors to intervene to prevent the mortgage being registered : *Crew* v. *Cummings.* (1)

The usual form of proviso added to an order for extension protects vested interests already acquired, but it cannot protect creditors who are not diligent enough to protect their own interests. An unsecured creditor of a company cannot take any steps to prevent such an order being made : *In re Ehrmann Brothers, Ld.* (2) No act of fraudulent preference is alleged against the company ; all that can be said is that it omitted to oppose the Trust's application.

It has been held that s. 265 does not overrule the decision in *In re Washington Diamond Mining Co.* (3) The decision in *In re Ehrmann Brothers, Ld.* (2) shows that the Court will not consider anything but the rights of parties already acquired. An unsecured creditor has no right to object to an order for extension of time for registering debentures.

[*Millard Tucker K.C.* referred to *In re Herts and Essex Waterworks Co.* (4)]

In Bankruptcy it is possible to go behind a judgment, but it is not so in company law.

Millard Tucker K.C. in reply. There is here no case against the Trust as such ; the only allegation is against the company. It was the duty of the company, after notice of the application, and being then insolvent, to bring the facts before the Court, in the interests of the unsecured creditors.

The words " other act " in s. 265 may include a judicial proceeding which can be taken by or against the company. In these applications the debtor company must be made respondent. On all the facts this was a judicial proceeding against the company. It was the duty of the company to

(1) (1888) 21 Q. B. D. 420.
(2) [1906] 2 Ch. 697.
(3) [1893] 3 Ch. 95.
(4) [1909] W. N. 48.

appear and to state all the relevant facts to the Court, if they were not put before the Court by the Trust.

If all the facts had been before the Court the order for extension would not have been made. The inadvertence referred to in s. 85 may be either in the creditor or the debtor. The usual proviso to the order is sufficient in the ordinary case of a solvent company continuing in business, but Buckley J. in *In re Cardiff Workmen's Cottage Co.* (1) suggested that there might be cases in which the matter would have to be considered further with the view of protecting unsecured creditors.

Cur. adv. vult.

1932. Nov. 16. EVE J. This is an application by the liquidator of the M. I. G. Trust, Ld. (hereinafter referred to as "the company"), whereby he seeks a declaration that certain proceedings by the Gresham Trust, Ld. (hereinafter referred to as "the Trust"), in which an order was made on March 10, 1931, extending the time for registration of particulars of a charge created on May 6, 1930, by deposit of deeds by the company in favour of the Trust constituted an undue and fraudulent preference of the Trust and such further relief as would be consequential on the making of such declaration.

The application is launched under s. 265, sub-s. 1, of the Companies Act, 1929, whereby it is provided that "any conveyance, mortgage, delivery of goods, payment, execution, or other act relating to property which would, if made or done by or against an individual, be deemed in his bankruptcy a fraudulent preference, shall, if made or done by or against a company, be deemed, in the event of its being wound up, a fraudulent preference of its creditors, and be invalid accordingly" and for the purposes of the section the commencement of the winding-up corresponds with the presentation of the bankruptcy petition in the case of an individual.

(1) [1906] 2 Ch. 627.

The law of bankruptcy to be applied is that contained in s. 44, sub-s. 1, of the Bankruptcy Act, 1914, whereby "every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor, or of any person in trust for any creditor, with a view of giving such creditor or any surety or guarantor for the debt due to such creditor, a preference over the other creditors, shall, if the person making, taking, paying or suffering the same is adjudged bankrupt on a bankruptcy petition presented within three months after the date of making, taking, paying or suffering the same, be deemed fraudulent and void as against the trustee in the bankruptcy."

The alleged fraudulent preference in this case is the suffering by the company of a judicial proceeding, in other words, the election of the company not to oppose the making of the order of March 10, 1931, or at least to direct the attention of the Court to circumstances which could, it is argued, have led the judge to refuse the extension asked for.

There is no dispute as to the relevant facts. On May 6, 1930, the company deposited with the Trust a parcel of title deeds relating to freehold properties in the county of Leicester as security for advances, accompanied by a memorandum of deposit in which the company undertook to execute any necessary deed when called upon to do so. In breach of its duty under s. 80 of the Companies Act, 1929, the company failed to register this charge under s. 79, and on March 10, 1931, the Court, upon the application of the Trust—to which the company was the sole respondent—"being satisfied that the omission to register a charge within the time required by this Act . . . . was accidental," pursuant to s. 85 of the Act ordered that the time for registration of the particulars of the charge should be extended until March 24, 1931. And the order concluded as usual with the statement that it was to be without prejudice to the rights of parties acquired prior to the time when the charge should be actually registered.

The requisite particulars and memorandum were filed on the same day with the registrar.

The respondent company did not appear on the hearing of the motion. On the first return day (March 6), when the evidence in support of the motion was not complete, counsel was briefed on behalf of the company, and it would appear from the exhibit W.H.P.7 that he was instructed on the hearing of the motion to bring to the notice of the Court the desperate financial position of the company, the common directorate of the company and the Trust, the fact that the very numerous creditors of the company, secured and unsecured, would undoubtedly be prejudiced if the Trust were permitted to register the charge, and that the company would probably present its own petition for winding-up. Between March 4 and 10 the brief to counsel on the company's behalf was withdrawn, and, so far as appears by the evidence, none of the facts referred to in the exhibit W.H.P.7 were brought to the notice of the Court on the hearing of the application.

The Trust, however, admits that through its directors, or some of them, it had notice of the company's financial embarrassments and of the matters stated in the exhibit, and that liquidation was imminent.

On March 31, 1931, the company was ordered to be wound up on a petition presented on the 18th of the same month.

In these circumstances, the liquidator contends that the order of March 10, 1931, would never have been made had the Court been informed of the relevant facts, that the company withdrew counsel's brief to prevent the Court from being so informed, that the Trust must be deemed to have had notice of all these matters by reason of the fact that one Wheeler who, from March 3 onwards, was the only continuing director and the managing director of the company, was also a director of the Trust, and that in these circumstances the Trust cannot be permitted to retain the advantage it obtained by the order. In the absence of evidence to the contrary, he accepts the view that the omission to register the charge was accidental and he does not allege that the application to extend the time was collusive, but he avers that in the course the company adopted it suffered a judicial proceeding, when unable to pay its debts as they became due from its own money, in favour of the Trust with a view to giving to the latter a preference over its other creditors. He, therefore, seeks to set aside the registration as being a fraudulent preference.

It will, I think, at this stage, be convenient to examine the pertinent sections and the procedure.

By s. 79, the charge of May 6, 1930, became void for want of registration against the liquidator and any creditor of the company on the expiry of twenty-one days after the date of its creation, and so remained when the notice of motion to extend the time for registration was served on the company on March 4, 1931. The avoidance of the security for non-registration did not prejudice the obligation to repay the money owing on the security; indeed, that became immediately repayable on the expiry of the twenty-one days.

Sect. 79 corresponds to s. 93 of the Act of 1908, and the words " shall, so far as any security on the company's property or undertaking is conferred thereby, be void against the liquidator and any creditor of the company " are to be found in both. In the case of *In re Monolithic Building Co.* (1), Lord Cozens-Hardy, the Master of the Rolls, construed the words " any creditor " as meaning " any secured creditor." He says (2) : " This section "—that is, s. 93—" says that so far as any security under the property comprised in the unregistered mortgage is concerned it is to be void against the liquidator, and any creditor of the company unless registered within this period. What does that mean ? I confess my inability to see that it means anything else than exactly what it says, namely, that it is void against any creditor who has a registered charge on the company's property. I cannot myself see any reason to doubt that, as a matter of construction of this section." This interpretation cuts down the generality of the expression "any creditor," but I cannot find that it has ever been dissented from and I do not think it is of importance on this occasion.

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(1) [1915] 1 Ch. 643.

(2) Ibid. 662.

I pass to s. 85, in which the relevant words are as follows: "The court, on being satisfied that the omission to register a charge within the time required by this Act . . . . was accidental, or due to inadvertence or to some other sufficient cause, or is not of a nature to prejudice the position of creditors or shareholders of the company, or that on other grounds it is just and equitable to grant relief, may, on the application of the company or any person interested, and on such terms and conditions as seem to the court just and expedient, order that the time for registration shall be extended." The application for extension must be made to the Chancery Division by motion or summons: Order LIII.B., r. 6. If it is made by any person other than the company, the notice of motion or summons is served on the company and the application is supported by evidence —frequently supplied by the company—proving that the omission was accidental or due to some inadvertence or to some other sufficient cause. It is also the practice to produce evidence that there is no winding-up pending and that no judgment against the company remains unsatisfied. The order, if made, is always qualified by the express proviso that it is made without prejudice to the rights of parties acquired prior to the time when the mortgage or charge shall be actually registered.

It was established in the case of *In re Ehrmann Brothers, Ld.* (1), that this proviso did not extend to the unsecured creditors, but only protected those who had acquired rights of property, or rights against property, and not those who had no right against the property in question and no charge upon it. In a subsequent case, *In re Cardiff Workmen's Cottage Co.* (2), Lord Wrenbury—Buckley J., as he then was —held that in granting an extension of time for the registration of debentures the Court will not necessarily impose any terms for the protection of unsecured creditors of the company, and there the matter stands.

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(1) [1906] 2 Ch. 697.

(2) [1906] 2 Ch. 627.

In the present case the requirements necessary for obtaining an order were complied with. The secretary of the Trust filed two affidavits, in the first of which he deposed that he did not register the charge because, in view of the fact that no formal mortgage was executed by the company, he was not aware that registration was necessary, and no solicitors were consulted. In para. 3 of his first affidavit and in his second affidavit, as the result of his inquiries addressed to the secretary of the company, he states he is informed and believes that "no petition for winding-up the company has been filed, that no notice has been served convening a meeting for the winding-up of the company and that no creditor is in a position to sign judgment or issue execution against any of the goods of the company." On those materials, and in the absence of the company, the order of March 10 was made.

I cannot take it upon myself to say what would have happened had the company appeared at the hearing and allowed the order to be made without comment. But had it appeared, and by its counsel informed the Court that on March 6, when the motion was mentioned and adjourned to the 10th, counsel had been instructed on behalf of the company to bring to the notice of the judge that the sole continuing director "is confident that in the circumstances which have happened the company must be put into liquidation, either on its own petition or following resolutions for winding-up," that the company would probably present its own petition, and that the creditors of the company, "of whom there are a very large number, will undoubtedly be prejudiced if the Trust is permitted to register the charge," and that the managing director of the company "felt that these facts should be brought to the knowledge of the Court," and had the Court been further informed that on the following day the brief containing these instructions had been withdrawn and that the company had thereby decided, by absenting itself from the hearing, to leave the

Court in ignorance of the true position and to allow the Trust to take the order without any opposition or comment on the part of the company, I feel satisfied that the judge, whose order under the section can be made on such terms and conditions as seem to the Court just and expedient, could have found means of affording to the creditors of the company an opportunity of debating the question whether the making of an order to rectify the register in such circumstances would not amount to a fraudulent preferring of the Trust. There is no evidence to explain the circumstances in which, or the intent or motive with which, the brief was withdrawn; the making of the order created a preference in favour of the Trust and the company fully realized that this would be the result. I can only conclude that the dominating intent or motive for the inaction of the company was to prefer the Trust.

I think the applicant has established that in suffering judgment in the judicial proceeding to go by default the company did so with a view of giving the Trust preference over its other creditors, and accordingly I declare that the registration of the charge on March 10, 1931, is void as against the applicant. The costs must be paid by the Trust.

H. L. L.

C. A.

The Gresham Trust appealed. The appeal was heard on February 24, 27 and 28, 1933.

Spens K.C. and *Tindale Davis* for the appellant Trust.

Millard Tucker K.C. and *H. M. Pratt* for the respondent liquidator.

The arguments in the Court of Appeal were substantially the same as those in the Court below. The following additional cases were referred to: *In re Bootle Cold Storage and Ice Co.* (1); *In re I. C. Johnson & Co.* (2); *In re Cohen* (3); *In re Lake* (4); *In re Tweedale* (5); *In re E. & F. Beattie, Ld.* (6); *In re Tingri Tea Co.* (7)

(1) [1901] W. N. 54.
(2) [1902] 2 Ch. 101.
(3) [1924] 2 Ch. 515.
(4) [1901] 1 K. B. 710.
(5) [1892] 2 Q. B. 216.
(6) [1901] W. N. 152.
(7) [1901] W. N. 165.

C. A.

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M. I. G. Trust, Ld., *In re.*

Lord Hanworth M.R. This appeal raises an important and interesting point on which this Court has come to a conclusion different from that of Eve J. The facts upon which the judgment must be passed are these. In 1910 there was a trust company incorporated which is called the M. I. G. Trust, Ld.; that seems to be the name under which it is known and I use that name; exactly what those letters originally stood for does not matter. The directors of that company were Sir Arthur Wheeler, a certain Mr. Leeson, and Mr. Pullman Wheeler. There was also the Gresham Trust, Ld. of which the directors were Sir Arthur Wheeler and Mr. Pullman Wheeler and others. It seems that the Gresham Trust has lent certain moneys to the M. I. G. Trust, and that fact is recorded and the security on which the loan had been made is set out in a letter of May 6, 1930, which is signed by Sir Arthur Wheeler, the chairman of the M. I. G. Trust, and is addressed to the Gresham Trust, Ld., Basildon House, Moorgate Street. The letter is in these terms: "Dear Sirs, enclosed we beg to hand you deed relating to three farms at Market Bosworth as follows," and then the three farms are described, giving a total of 650 acres, near Market Bosworth in Leicestershire, and the total cost as conveyed was 25,000*l.*; the additions of the land since that time were 7113*l.*, giving a total of 32,113*l.* 5*s.* 1*d.* The letter goes on "We undertake to execute any necessary deed in respect of these properties when called upon to do so. May we trouble you to kindly acknowledge receipt, value 24,000*l.*, ready market at any time." That charge ought to have been registered in accordance with s. 80 of the Companies Act, 1929, which by sub-s. 1 provides "It shall be the duty of a company to send to the registrar of companies for registration the particulars of every charge created by the company." By s. 79 the necessity for registration is made clear and the duty is imposed upon the company by s. 80, subject to a penalty if that is not done. Then "unless the registration has been effected," so run the later words of s. 80, sub-s. 3, of that Act, "the company and every director, manager, secretary or other person, who is knowingly a party to the default shall be liable to a fine not exceeding 50*l*. for every day during which the default continues." It is quite plain, therefore, that this letter of May 6 ought to have been registered in due course in accordance with s. 79 of the Companies Act, 1929, but it was not so registered. Time went on and there is no doubt at all that the M. I. G. Trust got into serious difficulties: there is evidence that the balance-sheet which was prepared and submitted at the end of December, 1930, was a balance-sheet which showed, I think, a total deficiency of something like 196,000*l*. or 197,000*l*.; it was revealing a situation which would seem to be irredeemable. On March 3, 1931, a receiving order was made against Sir Arthur Wheeler and he thereupon became disqualified from acting as a director of the M. I. G. Trust, and so it was that on and after that date Mr. Pullman Wheeler was the only director left of the M. I. G. Trust, for Mr. Leeson had also ceased to be a director. On March 4, 1931, a notice was given under s. 85 to have the time extended for the registration. That section is in these terms: "The Court, on being satisfied that the omission to register a charge within the time required by this Act, or that the omission or misstatement of any particular with respect to any such charge or in a memorandum of satisfaction, was accidental, or due to inadvertence or to some other sufficient cause, or is not of a nature to prejudice the position of creditors or shareholders of the company, or that on other grounds it is just and equitable to grant relief, may, on the application of the company or any person interested, and on such terms and conditions as seem to the court just and expedient, order that the time for registration shall be extended, or, as the case may be, that the omission or misstatement shall be rectified." That notice of motion was given and the M. I. G. Trust was served. On March 6, 1931, an order was made that the hearing of this motion should stand over until March 10 in order to complete the evidence requisite for it. On March 7 the M. I. G. Trust withdrew their instructions to their solicitors in the matter, and on March 10, at a time when the M. I. G. Trust were not represented before the Court, the order was made by Maugham J. extending the time for the registration of the charge in favour of the Gresham Trust. That order was made on March 10 and it was in these terms: "This Court being satisfied that the omission to register the mortgage or charge within the time required by the Companies Act was accidental doth pursuant to s. 85 order the time for registration to be extended until the 24th of March but this order is to be without prejudice to the rights of parties acquired prior to the time when such mortgage or charge shall be actually registered"; in fact the charge was immediately registered that same day. As a matter of fact the urgency of the matter is, I think, plain from the examination of those dates. The receiving order against Sir Arthur Wheeler was a matter which must have been known to the Court and to the Gresham Trust and also to counsel who were appearing in the matter, so it was not a thing which was in any way hushed up; it was a thing which was noised abroad, and the necessity for registering the charge was plain at that time.

Now it is stated that the conduct of the M. I. G. Trust in not appearing was the suffering of a judicial proceeding which falls within the words of s. 44, sub-s. 1, of the Bankruptcy Act, 1914, where it is stated: "Every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor, or of any person in trust for any creditor, with a view of giving such creditor, or any surety or guarantor for the debt due to such creditor, a preference over the other creditors, shall, if the person making, taking, paying or suffering the same is adjudged bankrupt on a bankruptcy petition presented within three months after the date of making, taking, paying or suffering the same, be deemed fraudulent and void as against the trustee in the bankruptcy." And it is contended that the conduct of the M. I. G. Trust in not appearing in order to bring the matters before the Court or in not resisting the extension of the time under s. 85 of the Companies Act, 1929, brings it within the terms of s. 44 of the Bankruptcy Act, 1914, as suffering a judicial proceeding, and it is said, as reinforcing that view, that there was in fact a brief prepared and existing at that very time. There were instructions which had been prepared at that time, but whether they ever reached the hands of counsel or not is not quite clear; but there was a brief prepared in which there is a record to be looked at as throwing some light upon the position taken up by the M. I. G. Trust and the knowledge of the Trust at that time. I will read para. 3 out of it: "Mr. A. F. P. Wheeler is confident that in the circumstances which have happened M. I. G. Trust, Ld., must be put into liquidation either on the company's own petition or following resolutions for voluntarily winding-up the company. The company will probably present its own petition." Now the Gresham Trust have from time to time lent very large sums of money to the M. I. G. Trust and the M. I. G. Trust deposited various securities, and the brief goes on: "Mr. Pullman Wheeler's instructions are that he was merely a nominal director of M. I. G. Trust, Ld., and knew nothing of its operations except as to the circumstances involving the loans and shares in which Gresham Trust, Ld., became interested. Counsel will appreciate that his position is a somewhat difficult one." Then para. 4 reads: "The creditors of M. I. G. Trust, Ld., of which there are a very large number, will undoubtedly be prejudiced if Gresham Trust, Ld., are permitted to register the charge and Mr. Wheeler feels that these facts should be brought to the knowledge of the Court on the application by Gresham Trust, Ld." Now I am not prepared to attribute to that record anything like the sinister view which would indicate that Mr. Wheeler was satisfied that the matter was one in which the application of the Gresham Trust ought to be resisted. I think it truly states that he appreciated and that counsel ought to appreciate that Mr. Pullman Wheeler's position was a very difficult one. He was conscious of the fact that the Gresham Trust had been lending money upon a security which they thought in times of stress would be a proper and valid security, and at the same time he also indicated that if the order was made, the security being in favour of the Gresham Trust, there would be less for the ordinary creditors, and at the same time, and on the other hand, it would seem very hard on the Gresham Trust, who had lent good money on certain terms and conditions, that their money which had been lent on those conditions should be used for the benefit of the unsecured creditors whereas they themselves had taken a certain amount of trouble to secure themselves in the advance that they had made. I can quite understand that Mr. Pullman Wheeler felt his position a difficult one. What was he to do ? What was he to advise ? In the end the M. I. G. Trust in this circumstance of difficulty did not appear, and the order was made by Maugham J. with the usual reservation which is now made in these orders and about which I shall have a word or two to say in a moment: "This order is to be without prejudice to the rights of the parties acquired prior to the time when such mortgage or charge shall be actually registered." As I have said, the registration was made on March 10, 1931, and on March 18, a petition was presented for the winding-up of the M. I. G. Trust, and on March 31 a compulsory order was made. On June 22, 1932, a summons was taken out by the liquidator of the M. I. G. Trust to set aside this registration of the charge in favour of the Gresham Trust on the ground that it operated as a fraudulent preference within s. 44 in favour of the Gresham Trust, and on November 16, 1932, Eve J. made the order in the terms of the summons, and from that summons this appeal is taken in this Court.

A good deal of argument has been presented which is germane to the two points which arise and which are perhaps shaded the one into the other. The one point is this: Would Maugham J. have made the order that he did if the M. I. G. Trust had appeared and if he had been advised of the imminence of the winding-up of the M. I. G. Trust? On one side it is said he surely would not have made such an order; on the other hand it is said that he would have made the order notwithstanding the presentation of the facts which ultimately crystallized into the winding-up of the company. To some extent the argument presented to us was dealing with the situation as it stood before Maugham J. on March 10, and also the situation as adopted by Eve J. when he treated the action or inaction of the M. I. G. Trust as resulting in a fraudulent preference and their conduct as being with a view to fraudulent preference. I think it is important to try and keep separate the position on these two separate occasions. We have the fact that Maugham J. did make the order on March 10, and he made it because, as the order states, the omission to register was accidental, and he made it with the reservation to which I have referred as to the rights of parties acquired prior to registration. I find it very difficult to say whether Maugham J. would have acted otherwise if there had been the fullest presentation of the facts relating to the M. I. G. Trust by some one appearing on its behalf, but I think the matter has to be tested by considering whether in view of what did happen and the absence of the M. I. G. Trust there was a suffering of a judicial proceeding with a view to giving a preference.

I should just for a moment like to say a few words about the purpose of s. 85 of the Companies Act, 1929. A reference was made by Buckley J. in *In re Joplin Brewery Co.* (1), the first case that came before him under what is now s. 85 (that was s. 15 of the Companies Act, 1900), to a power of a similar purpose in s. 14 of the Bills of Sale Act, 1878. It will be further observed when the two sections are referred to that there is a wide divergence between them in the powers given to the Court for the rectification of the registration of a bill of sale or an affidavit of renewal thereof under s. 14 of the Bills of

(1) [1902] 1 Ch. 79.

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Sale Act, 1878, and the terms of s. 15 of the Act of 1900. The earlier section, s. 14, only deals with the failure or the omission to register when it was accidental or due to inadvertence, and then the Court or judge may in his discretion order such omission or misstatement to be rectified, but that was all. Sect. 15 of the Act of 1900 is in much wider terms; it says that the rectification may be made where the omission was accidental or due to inadvertence or some other sufficient cause or is not of a nature to prejudice the position of the creditors or shareholders of the company, or that on other grounds it is just and equitable to grant relief. It seems to me quite clear that the Legislature did intend by those very wide terms not to give a restricted opportunity to repair an omission but to give the widest possible discretion to the Court in circumstances which need not show that the omission was accidental or due to inadvertence but which would be sufficient on other grounds to make it just and equitable to grant relief. But Buckley J., when dealing with that new situation created by the passing of that s. 15, treated it as if it were in pari materia with s. 14 of the Bills of Sale Act, 1878, and he at the close of his judgment in that case said (1): "I intimate my opinion that these words"—that the order should be without prejudice to the rights of parties acquired prior to the time when the debentures shall be actually registered—"ought to be added in every case, unless there is some good ground to the contrary—e.g., in cases in which the order could not prejudice the rights of any creditors." This would seem, therefore, to make too little use of the section, because it would only be exercised without prejudice to the rights of any creditors. But a little later on in the same volume there is found the case of *In re Spiral Globe, Ld.* (2), where Swinfen Eady J. made an order extending the time, with the addition of the words: "This order to be without prejudice to the rights of parties acquired prior to the time when such debentures shall be actually registered"—the same form that was used by Maugham J. in the terms that he laid down on March 10. It was gradually evolved by the cases to which our attention was drawn, that the rights which are protected are the rights which have been acquired before registration. Then in the same volume there is the case of *In re S. Abraham & Sons* (1), which is worth looking at, for that was a case in which there had been a winding-up already commenced, and inasmuch as it had been commenced and there were rights which had accrued, secured and unsecured, it was held that it would be unjust to other creditors to grant an extension of time, and that to make an order in the form in which the order had been made in the *Joplin Brewery* case (2) would be unfair, and the result was that the application was dismissed. Then comes the case of *In re Ehrmann Brothers, Ld.* (3), where the Court of Appeal dealt with the matter, and Vaughan Williams L.J., referring to the order made in the Court below, said (4): "According to my reading of this order the protection is given only to those who have acquired rights of property or rights against property, and this, as it seems to me, clearly does not include unsecured creditors who have no rights against the property in question and no charge against it." Romer L.J. said (5): "Now to my mind the true effect of that condition is that it was only intended to protect rights acquired against or affecting the property charged by the debentures." In other words, this protective clause is not to safeguard the rights of unsecured creditors but only those who are indicated in the two passages to which I have referred. Buckley J. in *In re Cardiff Workmen's Cottage Co.* (6) made the order in this form avowedly because, as he said, the Court will not insert any terms for the protection of unsecured creditors of the company. In other words we have got this: that when an order is made under s. 85 the limitation of the order ought not to favour unsecured creditors but it is only intended to protect the rights affected by a priority charge by the debenture holders, and the effect therefore of an order under s. 85 is that it is an order which may militate against, or certainly does not provide protection for the rights of unsecured creditors.

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(1) [1902] 1 Ch. 81.

(2) [1902] 1 Ch. 396, 399.

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(1) [1902] 1 Ch. 695.

(2) [1902] 1 Ch. 79.

(3) [1906] 2 Ch. 697.

(4) [1906] 2 Ch. 704.

(5) Ibid. 707.

(6) [1906] 2 Ch. 627.

I come, therefore, to consider what is the right of the liquidator in the present case. He says that by virtue of s. 265 of the Companies Act, 1929, he can destroy the effect of the order of Maugham J., because it did provide a fraudulent preference. Sub-s. 1 of s. 265 runs as follows: "Any conveyance, mortgage, delivery of goods, payment, execution, or other act relating to property which would, if made or done by or against an individual, be deemed in his bankruptcy a fraudulent preference, shall, if made or done by or against a company, be deemed, in the event of its being wound up, a fraudulent preference of its creditors, and be invalid accordingly." Do those words introduce all the words of s. 44 of the Bankruptcy Act? I do not think it is necessary in the decision of this case to come to a final determination on that point. I am going to assume in favour of the liquidator that by s. 265 he has as wide an opportunity of contesting and if possible avoiding as a fraudulent preference something which would be a suffering of a judicial proceeding within s. 44 of the Act of 1914. It is to my mind rather a wide assumption, but I will make it and then, having in that way introduced s. 44 into the liquidation, I will also make the assumption, without stopping finally to determine it, that the absence of the M. I. G. Trust at the time when they had notice of the motion that was to be made before Maugham J. was a suffering of a judicial proceeding, that mere inaction is to be deemed to be the suffering of a judicial proceeding inasmuch as they could have been there, though whether they could have been effectively there or not is a matter which, as I have already said, must be left open.

Making those two assumptions in favour of the liquidator, I now come to determine next what is to my mind the real point of the case: Was this suffering of a judicial proceeding done with a view of giving a creditor a preference over other creditors so that it ought to be deemed fraudulent and void as against the liquidator? Eve J. has held that it was.

Now when you are going to set aside some conveyance or transfer of property or charge as a fraudulent preference, I think it is plain that there must be evidence given affirmatively, not merely that there was in fact a preference but that the preference was given with a view or object or goal of preferring. To my mind that proposition remains abundantly established by *Sharp* v. *Jackson* (1), which affirms in terms the words used by Lord Esher in the same case when it was below in the Court of Appeal, under the name of *New, Prance & Garrard's Trustee* v. *Hunting.* (2) It is affirmed by the words of Lord Halsbury, who points out that if the Legislature had been minded to destroy conveyances and the like, which in fact preferred, it could have said so. His words are (3): "Nothing, I say, could have been easier than to have made such an enactment, if that was intended; but, in my opinion, no such intention is to be gathered from the statute. On the contrary, as Lord Cairns said, subject to certain express alterations which it then made in the previous state of the law, it did intend to bring with it all those conditions which, certainly, for something more than a century, have been imputed to these transactions, which must be regarded as fraudulent under the bankruptcy law." In saying that Lord Halsbury did not merely affirm what had been said in the Court below; he was affirming that for which there is a long sequence of authority. If I turn back for a moment to the last case which Mr. Tucker brought to our attention, *Ex parte Lancaster* (4), I find that Cotton L.J., a master of accurate English, says (5): "The words of the statute are, 'with a view to giving such creditor a preference over the other creditors.' That must mean that it is done substantially with the object of giving a preference." And in *In re*

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(1) [1899] A. C. 419.
(2) [1897] 2 Q. B. 19.
(3) [1899] A. C. 419, 423.
(4) 25 Ch. D. 311.
(5) Ibid. 318.

Cohen (1) I quote in my judgment the words of Mellish L.J., who was very experienced in bankruptcy matters: "But then [s. 92 of the Act of 1869] adds another qualification or condition, which is the very life and essence of the enactment, the payment so made must, in order to be void, be made 'in favour of any creditor with a view of giving such creditor a preference over the other creditors.' So that unless it can be made clearly apparent, and to the satisfaction of the Court which has to decide, that the debtor's sole motive was to prefer the creditor paid to the other creditors, the payment cannot be impeached, even although it be obviously in favour of a creditor."

Now it is quite impossible that a decision of this Court could in any way impinge upon that sequence of authority, and to my mind it did not. I think Warrington L.J. and I in *In re Cohen* (2) were united in our view of the law, and we held that there must be not merely preference in fact but evidence that there was in substance and in truth proof that the debtor's motive was to prefer the creditor above others. The divergence between us is as to the inference that he drew upon the facts. I do not think that the headnote in *In re Cohen* (2) accurately sets out what is the result of that case, and I have said more than once that Warrington L.J. and I were in unison upon the view of the law, and we were adhering, as Warrington L.J. in terms said, to the authorities binding upon us: the authorities to which I have referred both in the Court of Appeal as well as in the House of Lords.

I turn therefore to consider what is the evidence which we have here. It is true that by making this order, which is without prejudice to certain creditors but which does not protect, as I have already pointed out, the unsecured creditors, it does in effect prejudice certain creditors. It does give in fact a preference to the Gresham Trust. What else is there to show that this was done with the motive which is really a sinister motive for the purpose of preferring the Gresham Trust?

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(1) [1924] 2 Ch. 515, 533.

(2) Ibid. 515.

I have already pointed out that there was a clear duty under s. 79 that the charge should be registered, and that there was a punishment in the nature of a penalty under s. 80, and the duty thus imposed by statute is one which the M. I. G. Trust may have been aware of, and a duty which it may have been anxious should be fulfilled, in the sense that its omission should be got rid of.

Now that is all. Are we, for the sake of trying to benefit the unsecured creditors, to draw some other inference? To my mind, advising myself according to the specific directions already laid down to which I have referred, I find it impossible to say that the liquidator has established that this was done with a view to preferring. The explanation which is to hand is that it was done in pursuance of and in fulfilment of a duty laid upon the company that had been omitted, and I cannot find from the facts before the Court that there is sufficient to establish that this act was done in substance—and that is the right expression—for the purpose of giving a preference. Therefore, while I have given the benefit to the liquidator of making the two assumptions that I have already made, I do not find the evidence sufficient to enable him to fulfil the task which he set out to accomplish, and I find myself compelled to disagree with the view adopted by Eve J., with the result that this appeal must be allowed and the order destroying the effect of Maugham J.'s order must be set aside.

Lawrence L.J. I agree. For the purpose of my judgment I am willing to assume, without, however, expressing any opinion whether the assumption is well or ill founded, that by not appearing at the hearing of the application made on behalf of the Gresham Trust for an extension of time within which to register their charge, the M. I. G. Trust suffered a judicial proceeding which in fact gave the Gresham Trust a preference over the other creditors of that company; and further, that s. 265 of the Companies Act, 1929, notwithstanding that it does not mention judicial proceedings suffered, applies to cases where an insolvent debtor company has suffered judicial proceedings with a view to giving a preference to a particular creditor over its other creditors. On these assumptions the sole question is whether the liquidator of the M. I. G. Trust has discharged the onus which lies on him of proving that the dominant intention of the M. I. G. Trust in suffering the judicial proceedings was to prefer the Gresham Trust. It must be borne in mind that the question, whether or not the dominant motive or intention of a debtor is to prefer a particular creditor, is one of fact, and that it follows that the numerous decisions on this question are only useful as examples of the circumstances in which the Court, on the evidence before it, has been led to one or other conclusion: see Williams' Bankruptcy Practice, 14th ed., p. 323, and the cases there cited.

Much reliance was placed by Mr. Tucker upon the decision of this Court in *In re Cohen.* (1) In that case Warrington L.J. and Sargant L.J. (the Master of the Rolls dissenting) held that the proper inference to be drawn from the proved facts was that the payment in question was made by the debtor with the dominant intention to prefer one of his creditors. Warrington L.J. stated at the outset of his judgment (2) that: "The question is purely one of fact, the answer to which in the present case, at all events—there being no statement by the debtor himself as to his view at the time—must depend on the inference the tribunal draws from the facts proved or admitted"; and then the learned Lord Justice states the facts proved in that case and asks himself the question: "What is the proper inference to be drawn from these facts?" Now up to that point in his judgment there was no divergence between the opinion expressed by the Master of the Rolls and that expressed by Warrington L.J.; the divergence only arose as to how the question so put should be answered. The Master of the Rolls considered that the proved facts did not warrant the inference that the dominant intention of the debtor was to prefer the creditor; Warrington L.J., on the other hand, came

(1) [1924] 2 Ch. 515.

(2) Ibid. 536.

to the conclusion that the only proper inference to be drawn from the evidence was that the dominant intention of the debtor was to prefer the creditor. Sargant L.J., however, whilst agreeing with the result arrived at by Warrington L.J., in the course of his judgment, stated in effect that a voluntary payment by an insolvent debtor on the eve of bankruptcy without explanation was in his opinion prima facie evidence of an intention to prefer, and the expression of this opinion lends colour to the statement contained in the headnote to the report. I would point out, however, that Sargant L.J. stated that in the case before him there was no alternative hypothesis admitted, and that no other view or intention on the part of the bankrupt was proved or even suggested, and that neither the Master of the Rolls nor Warrington L.J. purported to lay down any general rule as to what would or would not constitute prima facie evidence of an intention to prefer. In these circumstances I am of opinion that the headnote does not correctly state the true result of the decision in that case. Each case must depend upon its own special circumstances, and the facts in the present case are essentially different from those which led Warrington L.J. and Sargant L.J. in *In re Cohen* (1) to the conclusion that a case of fraudulent preference had been established.

In the present case we have the outstanding fact that it was the duty of the M. I. G. Trust under s. 80 of the Act to register the charge which it had created in favour of the Gresham Trust within twenty-one days after it had been signed. The M. I. G. Trust had omitted to discharge that duty, and by reason of that omission had not only jeopardized the security which it had given to the Gresham Trust, but also had exposed itself and its officers to heavy penalties, which were still being incurred day by day when the application for the extension of time to register the charge came before the Court. Mr. Spens relied strongly on these facts as proving conclusively that the true inference to be drawn from them was that the dominant intention of

(1) [1924] 2 Ch. 515.

the M. I. G. Trust, in suffering the judicial proceedings, was to repair its breach of duty or to escape the consequences of such breach.

Now, in my judgment there is a good deal to be said in favour of drawing that inference, but it is not necessary for the Court to go so far as to hold that this is the only inference that could properly be drawn : it is sufficient, in my judgment, that the facts in this case are as consistent with the inference that such was the dominant intention as with the inference that the dominant intention was to prefer the Gresham Trust. Mr. Tucker, in support of his contention that the true inference to be drawn from the proved facts was that the dominant intention was to prefer the Gresham Trust, relied on the fact that there was a close relationship between the Gresham Trust and the M. I. G. Trust, as the managing director of the Gresham Trust was the sole director of the M. I. G. Trust. In my opinion the point so made is much discounted, if not entirely neutralized, by the fact that the evidence conclusively shows that there was no collusion between the two companies in the judicial proceedings in question, and where the alleged fraudulent preference consists of suffering judicial proceedings, one of the important matters for consideration is whether the proceedings were collusive or not. In *Ex parte Lancaster* (1) Lindley L.J. stated as one of his reasons for coming to the conclusion that there was no fraudulent preference that he was satisfied there was nothing like collusion or anything of that sort.

It follows from what I have stated that in my judgment the liquidator has failed to discharge the onus which lies upon him, and that this appeal ought to succeed, with the consequences mentioned by the Master of the Rolls.

Romer L.J. I have come to the same conclusion. Immediately before Maugham J. made the order of March 10, 1931, the Gresham Trust's charge on the property of the company was ineffective as against its liquidator and its creditors. The effect, therefore, of the judicial proceedings before Maugham J. extending the time, when followed by registration of the charge, was to put the Gresham Trust into a preferential position as compared with the unsecured creditors of the company and therefore to give the Gresham Trust a preference.

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(1) 25 Ch. D. 311, 319.

Now I am willing to assume, as the other members of the Court have assumed, that where a company suffers a judicial proceeding relating to its property, it does an act relating to property within the meaning of s. 265 of the Companies Act, 1929, and I am further willing to assume that, by staying away from the Court and being unrepresented when the motion came before Maugham J., the company suffered that judicial proceeding. But the question then arises whether the preference obtained by the Gresham Trust was in any sense due to the suffering of the judicial proceedings on the part of the company? In my opinion, it was not. It was said by Mr. Tucker that if the facts disclosed in the brief originally delivered to counsel on behalf of the company, but subsequently withdrawn, had been disclosed to Maugham J. he, in the interests of the unsecured creditors, would either have refused to make any order at all extending the time, or would have inserted words protecting the interests of the unsecured creditors, or would have adjourned the matter in order to consult their wishes, or might have made an order subject to the consent of all the unsecured creditors being obtained. In my opinion he would have done nothing of the kind. It is not the practice of the Court, when making orders under s. 85 of the Companies Act, 1929, any more than it was the practice of the Court when making orders under the sections of the earlier Acts corresponding to s. 85, to insert words protecting the interests of unsecured creditors.

When the Companies Act of 1900 was passed, which was the first Act that necessitated the registration of certain mortgages and charges created by a company, and which contained in s. 15 words substantially identical with s. 85 of the present Act, the Court, when application was made to extend the time for registration, followed the practice which prevailed under the Bills of Sale Act, 1878, when application was made under s. 14 of that Act, and protected not all the creditors or unsecured creditors of the company, but only such creditors as had obtained an interest in the property of the company, whether by way of charge or by way of execution actually levied against the property of the company.

It was, indeed, suggested by Buckley J. in *In re Cardiff Workmen's Cottage Co.* (1), and had, I think, been suggested by him in earlier cases, that provisions ought to be inserted, at any rate in certain cases, protecting the unsecured creditors. The learned judge did not, with all respect to him, consider what would have been the effect of so doing. If words are put in protecting unsecured creditors whose debts exist at the time of making the order the secured creditor who is applying for an extension of time will be deprived in the large majority of cases of all the benefit of the section of the Act.

Sect. 85 was passed, and s. 15 of the Act of 1900 was passed, for the purpose of protecting a secured creditor from the results of a perfectly innocent mistake made by him and by the company as mortgagor, and such a provision as was suggested by Buckley J. would in effect put the secured creditor in a worse position than he would be in if he took, at the date when the order was made, a new charge from the company, because, by taking a new charge from the company, he would at once obtain priority over all the existing unsecured creditors of the company, subject only to any question that might arise of undue preference; but Buckley J.'s provision would postpone him, or rather, not postpone him, but compel his debt to rank pari passu with those of all the existing unsecured creditors. In *In re Ehrmann Brothers, Ld.* (2), the words "without prejudice to the rights of creditors," inserted in the order, necessarily were accordingly treated as referring only to the secured creditors; that is to say, creditors who had acquired some interest in the property ol the company. But, said Mr. Tucker, if that is so, and if the Court is not going to protect unsecured creditors, why is it that the Court always insists on being furnished with evidence to the effect that there has been no judgment obtained against a company, that no resolution has been passed or even notice sent out convening a meeting of the company to pass a resolution to wind up? It is a perfectly pertinent observation, but the answer is this: the Court, as far as I know, does not do it. I do not know of any case in which the Court has insisted upon having evidence of that kind. It is perfectly true that in practice such evidence is nearly always furnished to the Court when application is made under s. 85, but I think the reason for that is to be found by reference to *In re Bootle Cold Storage and Ice Co.* (1), which is, as Mr. Tucker tells us, the first reported case of any extension made under s. 15 of the Act of 1900. In looking at this report I find a statement that, in addition to other relevant facts, "evidence was given that the company was still carrying on business, and that no petition to wind up the company had been presented, nor had notice of a meeting to pass a resolution to wind up the same been given, nor had any creditor recovered judgment against the company."

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(1) [1906] 2 Ch. 627.

(2) [1906] 2 Ch. 697.

Counsel in that case, however, stated to the Court that in the parallel case of an application to extend the time for registering a bill of sale under s. 14 of the Bills of Sale Act, 1878, it was necessary to show that the grantor was not bankrupt, and that no creditor had levied execution on the goods, and that was perfectly true; but the affidavit in support set out a good deal more than what was required when an application was made under s. 14 of the Bills of Sale Act, 1878. Now Farwell J. said: "I think the facts proved bring the case within s. 15 and I therefore extend the time." The result of that of course was that any one who made an application under the section after that note appeared in the Weekly Notes, if he knew his business, would put into his affidavit evidence similar to that in

(1) [1901] W. N. 54.

the case before Farwell J., and I think in that way the practice has sprung up and is still continuing of putting in statements which to my mind are wholly irrelevant; that is to say, statements which do not indicate that there is anybody who has obtained any interest in the property of the company, but statements dealing with the position of the company so far as regards its unsecured creditors.

It seems to me, therefore, that the liquidator here fails in establishing the first part of the proposition which he must establish—namely, that the suffering of the judicial proceedings by the company resulted in a preference. But further than that, assuming that they did, then in my opinion he has not discharged the onus which lies upon him of showing that the dominant motive of the company in suffering those judicial proceedings was to prefer the Gresham Trust.

The headnote of *In re Cohen* (1) was much relied upon by Mr. Tucker, and has already been referred to by my Lord. In consequence of that headnote, unfortunately, this statement appears in a note on s. 44 of the Bankruptcy Act in Williams' Bankruptcy Practice, 14th ed., p. 323: "A man is presumed to intend the necessary consequences of his acts; and it was held by the Court of Appeal (Pollock M.R. dissentiente), in *In re Cohen* (1), that when the trustee has proved that a debtor in imminent expectation of bankruptcy paid a creditor so as to prefer him in fact, the onus is shifted and that it is then for the creditor to prove the existence of some motive other than the intention to prefer."

Now, in point of fact, so far from that being held in *In re Cohen* (1), the direct contrary of that was held by the Master of the Rolls and Warrington L.J.; and if and so far as Sargant L.J. decided to the contrary, his judgment must be regarded as the dissenting judgment in the case. The Master of the Rolls and Warrington L.J. both addressed themselves to the question of whether in that case, looking at all the evidence produced by the trustee in bankruptcy, it could be said that he had shown a prima facie case on the part of the debtor to prefer. The Master of the Rolls came to the conclusion that a prima facie case had not been made by the trustee, and Warrington L.J., dissenting, came to the conclusion that it had. But they were united in their views of the law. In each case it is for the trustee in bankruptcy or for the liquidator to adduce such evidence as he can in support of his contention of fraudulent preference, and if that evidence does not make out a prima facie case of a dominant intention on the part of the company or bankrupt to prefer, then his contention necessarily fails. If he does make out such a prima facie case, it is for the company or the debtor to try to displace it by evidence on their part. For this reason I agree that this appeal must be allowed.

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(1) [1924] 2 Ch. 515.

Appeal allowed.

Solicitors for appellants: *Clifford-Turner, Hopton & Lawrence.*

Solicitors for respondent: *Mayo, Elder & Rutherfords.*

W. I. C.

CLAUSON J.

1933

Feb. 17, 20, 27.

In re CHOWOOD'S REGISTERED LAND.

[1932. C. 579.]

Land Registry—Estate of Proprietor of Freehold Land Registered with Absolute Title under Land Transfer Acts, 1875 *and* 1897*—Overriding Rights under Limitation Acts—Registration erroneously including Strips to which a Stranger had acquired a Title under Limitation Acts—Rectification of Register by removing Strips therefrom—Right of Registered Proprietor to Indemnity—No Loss Suffered by Reason of Rectification—Land Registration Act,* 1925 (15 *Geo.* 5, *c.* 21), *ss.* 69, 70, *sub-s.* 1 (*f*); 83.

On April 22, 1925, Chowood, Ld. (hereinafter called "Chowood"), were registered as proprietors, with an absolute title, of certain freehold lands which they had purchased from and had had conveyed to them by the vendor. The lands so registered included strips of woodland to which, without the knowledge of Chowood, a title by possession under the Real Property Limitation Acts had, before the date of Chowood's registration, been acquired by one Lyall, an adjoining owner.

In an action by Chowood against Lyall for trespass on the strips of woodland, Lyall established her title under the Limitation Acts and counterclaimed rectification of the register. Luxmoore J. ordered rectification of the register by removing therefrom Chowood's title to the strips, and the register was rectified accordingly; see *Chowood, Ld.* v. *Lyall* [1930] 1 Ch. 426; affirmed on appeal [1930] 2 Ch. 156.

Upon an application by Chowood against the Attorney-General (on behalf of the official trustees of the Insurance Fund established under the Land Transfer Act, 1897: see s. 85, sub-s. 1, of the Land Registration Act, 1925) that their claim to be indemnified under s. 83 of the last mentioned Act in respect of loss alleged to have been suffered by reason of the rectification might be determined by the Court:—

Held, that, as the applicants' registered land was subject to the overriding rights of Lyall to the strips of woodland which she had then already acquired under the Real Property Limitation Acts (see Land Registration Act, 1925, ss. 69, 70, sub-s. 1 (*f*)), the rectification of the register for the purpose of giving effect to those overriding rights had put the applicants in no worse position than they were in before such rectification; with the result that the applicants having suffered no loss by reason of the rectification were not entitled to be indemnified under s. 83 of the Land Registration Act, 1925.

IN October, 1924, Chowood, Ld. (hereinafter called "Chowood"), agreed to purchase lot 50, which remained unsold after a recent sale by auction of the Ashtead Park Estate at Walton-on-the-Hill in the county of Surrey, and on March 10, 1925, the lot, which comprised thirty acres of land or thereabout and included the strips of woodland, was conveyed to Chowood in fee simple.

On April 22, 1925, Chowood applied under the Land Transfer Acts, 1875 and 1897, for registration as proprietors with absolute title of the land so conveyed to them, including the strips of woodland, and, upon such application, declared that "they were not aware of any question or doubt affecting the title to the property or any part thereof or of any matter or thing whereby the title was or might be impeached, affected or called in question in any manner whatsoever."

Accordingly, on the same April 22, 1925, Chowood were registered as proprietors with absolute title of the lands, including the said strips of woodland, all which lands were shown and edged with red on the filed plan under Title P. 12039.

In an action brought by Chowood against Mrs. V. M. Lyall for trespass on the strips of woodland, the defendant Lyall succeeded in establishing her title to those strips by possession under the Real Property Limitation Acts, and counterclaimed rectification of the register in respect of the strips. By an order made by Luxmoore J. on December 18, 1929, the plaintiffs' action was dismissed and it was declared that the defendant Lyall was on April 22, 1925, entitled in fee simple to the strips of woodland forming part of the land shown and edged with red on the filed plan P. 12039: and it was ordered that pursuant to s. 82 of the Land Registration Act, 1925, the registrar should rectify the register by omitting the said strips of woodland from the property edged with red on the filed plan: see *Chowood, Ld.* v. *Lyall.* (1) In pursuance of and in accordance with that order the register was rectified.

This was an application under s. 83 of the Land Registration Act, 1925, by Chowood against the Attorney-General (on behalf of the official trustees of the Insurance Fund established under the Land Transfer Act, 1897) that their claim to be indemnified in respect of loss alleged to have been suffered by reason of the rectification (which claim had been referred to the Court by the Chief Land Registrar) might be determined by the Court. Both the applicants and the respondent agreed to treat the finding of facts in *Chowood, Ld.* v. *Lyall* (1) as binding upon them.

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(1) [1930] 1 Ch. 426; 2 Ch. 156.

A. F. Topham K.C. and *N. C. Armitage* for the applicants. The applicants have suffered loss by reason of the rectification of the register in Lyall's favour, and are entitled under s. 83 of the Land Registration Act, 1925, to be indemnified. By their registration with an absolute title the applicants acquired the land free from the rights of all persons whomsoever, including any person who had acquired a title by length of possession: Land Transfer Act, 1875, ss. 7, 21. The latter section is repealed and re-enacted by s. 12 of the Land Transfer Act, 1897, the concluding proviso of which shows that, in the case of an absolute title, the effect of registration is the same after 1897 as before. Sch. I. to the Act of 1897 provides that "subject to the provisions of this Act, rights acquired or in course of being acquired under the limitation Acts" are not to be deemed incumbrances. But the object of the schedule was to introduce amendments of minor details: see s. 18. It ought to be construed so as to leave s. 12 unimpaired; and the words "subject to the provisions of this Act" have that effect. The applicants therefore had, on December 31, 1925, a title free from Mrs. Lyall's rights, whether she had acquired them under the Limitation Acts or not. But in fact she had not so acquired them. Luxmoore J. held that she or her predecessor was in possession throughout. A rightful owner who and whose predecessors have always had possession does not require the protection of the Limitation Acts, which do not transfer rights, but merely extinguish titles, and prevent a wrongful possessor from being ejected. If there is no wrongful possession, the Limitation Acts have no operation, and their existence is immaterial to the rightful owner in possession.

The Land Registration Act, 1925, is a consolidating Act. To find how the law was altered on January 1, 1926, it is

(1) [1930] 1 Ch. 426; 2 Ch. 156.

necessary to look at the amending legislation: Part X. of the Law of Property Act, 1922, and Sch. XVI. to that Act. Sect. 173 of that Act completely alters the law as to the acquisition of title by length of possession to registered land, but it does not deprive persons registered before the Act came into operation of the title which they had acquired. The terms of para. 5, sub-para. 2, of Sch. XVI. show that the new definition of "overriding interests" was not intended to have a retrospective effect. The Act of 1925 did not alter the law. In s. 69, sub-s. 1 (1), "overriding interests, if any," means the same thing as "such of the overriding interests as may be for the time being subsisting in reference thereto" in s. 70, sub-s. 1. Land that was free from overriding interests on December 31, 1925, did not become subject to them on January 1, 1926. In s. 70, sub-s. 1 (*f*), the words "subject to the provisions of this Act" are probably a mere reproduction of the same words in Sch. I. to the Act of 1897. The Act of 1925 ought to be construed so as not to destroy vested rights without compensation.

The loss which the applicants have suffered ought to be measured by the difference between the value of the land which, when they bought it, was described as comprising the strips of woodland and the value of that land minus the strips.

(1) Sect. 69, sub-s. 1: "The proprietor of land (whether he was registered before or after the commencement of this Act) shall be deemed to have vested in him without any conveyance, where the registered land is freehold, the legal estate in fee simple in possession . . . . but subject to the overriding interests, if any, including any mortgage term or charge by way of legal mortgage created by or under the Law of Property Act, 1925, or this Act or otherwise which has priority to the registered estate."

Sect. 70, sub-s. 1: "All registered land shall, unless under the provisions of this Act the contrary is expressed on the register, be deemed to be subject to such of the following overriding interests as may be for the time being subsisting in reference thereto, and such interests shall not be treated as incumbrances within the meaning of this Act (that is to say):—

(*f*) Subject to the provisions of this Act, rights acquired or in course of being acquired under the Limitation Acts.

(*g*) The rights of every person in actual occupation of the land or in receipt of the rents and profits thereof, save where enquiry is made of such person and the rights are not disclosed."

Sir Boyd Merriman S.-G. and *Stafford Crossman* for the Attorney-General. According to the findings of fact by Luxmoore J. and the Court of Appeal in *Chowood, Ld.* v. *Lyall* (1) Lyall acquired by adverse possession under the Statutes of Limitation a title to the strips of woodland in question and had acquired that title by April 22, 1925, when Chowood were registered with an absolute title to those strips. Unless the contrary can be shown, Lyall's right to those strips was an "overriding interest" within the meaning of ss. 69, 70, sub-s. 1 (*f*), of the Land Registration Act, 1925, to which overriding interest Chowood's legal estate in fee simple (which he is to be deemed to have had vested in him as the registered proprietor under s. 69, sub-s. 1) was subject under s. 70, sub-s. 1 (*f*); and that, notwithstanding Chowood's registration was before the commencement of the Act of 1925: see s. 69 of that Act. Reliance is placed mainly upon sub-s. 1 (*f*) of s. 70 of the Act of 1925; but, if necessary, it is submitted that Chowood's estate in the land was subject, under sub-s. 1 (*g*) of s. 70, to Lyall's overriding right through her receipt of the profits of the strips in question; for her periodical cuttings of underwood on those strips put her in the position of one in the receipt of the profits of the woodland strips, within the meaning of sub-s. 1 (*g*). Even if the Acts of 1875 and 1897 applied, the applicants would be in no better position. Sect. 21 of the Act of 1875 placed a registered proprietor with an absolute title in a better position than one with a possessory title, in that adverse possession could not affect him. Sect. 21 of the Act of 1875 was, however, repealed by the Act of 1897, and by s. 12 of that Act was re-enacted with certain important modifications. Under s. 12 of the Act of 1897 registration had no effect on Lyall's position in view of the fact that, at the date of Chowood's registration with an absolute title, Lyall had already completely acquired an adverse possessory title to the strips in question under the Statutes of Limitation: see *Chowood, Ld.* v. *Lyall.* (1) The Land Transfer Acts of 1875 and 1897 (except that Part of the 1897 Act which established a real representative) were wholly repealed by s. 147 of the Land Registration Act, 1925. That Act is an Act to consolidate the statute law relating to the registration of land. The enactments contained in s. 70 of that Act are in no sense dependent upon the repeal of the older Acts or either of them. Sects. 69 and 70 must be treated as fresh and independent enactments by which alone the present question is to be governed.

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(1) [1930] 1 Ch. 426; 2 Ch. 156.

Topham K.C. in reply. Sect. 69 of the Land Registration Act, 1925, deals only with the vesting of legal estates consequential on the new system introduced by the Law of Property Act, 1925. The expression " the overriding interests, if any," in sub-s. 1 of that section means the overriding interests, if any, affecting the land immediately before 1926. See also s. 147 of the Land Registration Act, 1925.

Cur. adv. vult.

1933. Feb. 27. Clauson J. On April 22, 1925, Chowood, Ld. (whom I will, for convenience, refer to as "Chowood"), having contracted to buy from certain vendors whom I will call " Ralli " a tract of land which consisted of certain land (which I will call "the Ralli Estate") in the possession of Ralli, together with a strip of land in the possession of a lady whom I will refer to as " Lyall," and having obtained from Ralli a conveyance which was expressed to convey to Chowood the Ralli Estate, and also the strip, obtained registration of themselves (Chowood) as proprietors with absolute title of the Ralli Estate and the strip. The attention of Chowood was not drawn to the fact that the strip was (as was afterwards held to be the fact by Luxmoore J. and the Court of Appeal) in the possession of Lyall. On January 1, 1926, the Land Registration Act, 1925, became law, and by reason of s. 69 of that Act the Court thereupon became bound to deem Chowood (as being proprietors registered before January 1, 1926) to have vested in them the legal estate in fee simple in possession of the Ralli Estate and of the strip, subject to the " overriding interests." Turning to s. 70, I find that the overriding interests to which the land is to be deemed to be subject are such of (inter alia) the following overriding interests as may be for the time being subsisting in reference thereto—namely: "(*f*) Subject to the provisions of this Act, rights acquired or in course of being acquired under the Limitation Acts," and "(*g*) The rights of every person in actual occupation of the land or in receipt of the rents and profits thereof" (with an immaterial exception).

The strip to which I have referred is a strip of woodland adjoining the Ralli Estate.

In the year 1929 Lyall caused wood to be cut on the strip. Chowood thereupon sued to restrain Lyall from trespassing on the strip. When the action came on Chowood failed to prove possession; Lyall proved to the satisfaction of the Court possession by herself and her predecessors in title from at least 1911; and Luxmoore J. ordered rectification of the register by eliminating the strip from Chowood's registered title, the rectification being ordered under s. 82 of the Land Registration Act, 1925. The Court of Appeal upheld the decision of Luxmoore J. Chowood then proceeded to claim indemnity under s. 83 in respect of loss alleged to have been suffered by reason of the rectification ordered by Luxmoore J. The question has been referred to the Court by the Land Registrar, and I have now to determine whether any loss has been suffered. The claim is opposed by the Attorney-General, on behalf of the trustees of the statutory fund out of which the indemnity, if any, has to be provided.

Chowood suggest that the loss is to be measured by the difference between the value of the land which, when Chowood bought from Ralli, was described as comprising the strip, and the value of that land less the strip.

I am, of course, in no way concerned with the rights as between Chowood and their vendor. I am concerned only to see what loss was occasioned by the rectification of the register by the elimination of the strip from Chowood's registered title.

Immediately before the rectification of the register the position, as I have indicated above, was that Chowood's estate was "subject to rights acquired or in course of being acquired under the Limitation Acts."[1] On the facts as they appeared in the case of *Chowood, Ld.* v. *Lyall* (1) (and the findings of fact in that case are by agreement to be treated as binding between the present parties), Lyall was in possession of the strip when Chowood's title was registered, and, of course, also when the Land Registration Act, 1925, came into force, and also immediately before and at the date of the rectification of the register. Further, that possession was, at each of those dates, protected against any claim by Chowood to enter upon it, the protection flowing from the fact, established by Lyall in the former litigation, that Lyall and her predecessors had had possession for such length of time as would be an answer under the Limitation Acts to any such claim by Chowood. It appears to me to follow that Lyall's rights were accordingly rights acquired under the Limitation Acts. It was suggested that the words "subject to the provisions of this Act" affect the matter. I cannot see why. The reference seems to be to s. 75, which contains very special provisions which prevent rights acquired under the Limitation Acts from operating under certain circumstances to extinguish the estate of the registered proprietor. This does not seem to have any operation upon the position in the case with which I am now dealing. It was further suggested that Lyall's title depended to some extent on what was called a paper title, and not solely on the Limitation Acts. I do not say what the position might have been if Lyall's paper title had disclosed, for example, a grant to her by Ralli's predecessor in title which could be used to defeat Chowood's claim to the strip without recourse to the Statute of Limitations. Such a case can be dealt with when it arises. In the present case Lyall's paper title was of value simply as some evidence of length of possession, and had no other operation; the paper title, save in so far as it supported a plea of possession for the statutory period, would not have helped to defeat Chowood's claim. It results from this that Chowood's title was all along subject to the rights which Lyall has succeeded in establishing; and the loss, if it may properly be so called, which Chowood has suffered is that they have not got, and since the Act of 1925 came into force (whatever may have been the position before) have never had title to the strip, except subject to an overriding right in Lyall. That loss was occasioned by Chowood failing to ascertain that, when they bought, Lyall was in possession, and in possession under such circumstances that Ralli could not make a title to the strip. The loss was occasioned by paying Ralli for a strip to which Ralli could not make title. The rectification of the register merely recognized the existing position, and put Chowood in no worse a position than they were in before.

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(1) [1930] 1 Ch. 426.

In these circumstances I must hold that Chowood have suffered no loss by reason of the rectification of the register.

I ought to add that a number of points of interest and difficulty were discussed in the course of the hearing, including the question what would have been the position had similar circumstances occurred, (*a*) between the passing of the Land Transfer Act, 1875, and the passing of the Act of 1897; (*b*) between the passing of the Act of 1897 and the coming into operation of the Act of 1925; (*c*) if there had been a finding in *Chowood, Ld.* v. *Lyall* (1) that Lyall was in actual occupation, or a clear finding that Lyall was, at the crucial moment, in receipt of profits. In the view I take it becomes unnecessary for me to express opinions on the various points so discussed, some of them points of grave difficulty, and accordingly, any opinions I might so express would be mere dicta. It appears to me to be wise that I should confine my remarks to the grounds on which I decide the case.

A convenient form of order will be to declare that the applicants, Chowood, Ld., have no valid claim to indemnity under s. 83 of the Land Registration Act, 1925, this declaration being preceded by the words: "the Court being of opinion that the applicants have not suffered loss by reason of the rectification mentioned in the summons of the register of the title therein also mentioned."

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(1) [1930] 1 Ch. 426.

Sect. 83, sub-s. 7, does not deal directly with the present case, but I think I may properly treat it as indicating to me the lines upon which my discretion as to costs ought to be exercised. I propose, therefore, to leave the order silent as to costs, so that each party will bear their own.

Solicitors: *Corsellis & Berney*; *Treasury Solicitor*.

H. C. H.

BURNHAM-ON-SEA URBAN DISTRICT COUNCIL *v.* CHANNING AND OSMOND.

[1931. B. 5990.]

MAUGHAM J.
1933
Feb. 16.

Local Authority—Houses for the Working Classes—Proposals for promoting Building—Conditions of Assistance—Approval of Minister of Health—Condition as to Maximum " Selling Price or Value " accepted by Builders—Housing, &c., Act, 1923 (13 *&* 14 *Geo.* 5, *c.* 24), *s.* 1, *sub-s.* 1, *para.* (*a*); *s.* 2, *sub-ss.* 1, 4—*Housing* (*Financial Provisions*) *Act,* 1924 (14 *&* 15 *Geo.* 5, *c.* 35), *s.* 1, *sub-s.* 1.

By s. 2, sub-s. 1, of the Housing, &c., Act, 1923: " Local authorities . . . . may, in accordance with proposals submitted by them to the Minister " (i.e., the Minister of Health) " and approved by him, promote the building of houses, ... by giving or undertaking to give assistance in respect thereof in manner hereinafter provided."

By sub-s. 4: " Assistance given by a local authority under this section in respect of a house may be made subject to such conditions as the local authority may with the approval of the Minister impose, including a condition that during such period as may be specified by the local authority the house shall not be used otherwise than as a separate dwelling-house and no addition thereto or enlargement thereof shall be made without the consent of the local authority " :—

Held, that a condition limiting the maximum price at which a house built with a subsidy from a local authority may be sold by the builder is valid.

WITNESS ACTION.

The plaintiff council, under the Housing, &c., Act, 1923, and the Housing (Financial Provisions) Act, 1924, obtained the approval of the Minister of Health to proposals for promoting the building of houses for the working classes and to terms and conditions on which it would help building. By s. 1, sub-s. 1, para. (*a*), of the Housing, &c., Act, 1923: "The Minister of Health . . . . shall, subject to such conditions as . . . . he may determine, make or undertake to make contributions out of moneys provided by Parliament:—(*a*) towards any expenses incurred by a local authority for the purposes of Part III. of the Housing of the Working Classes Act, 1890 . . . . in promoting in accordance with section two of this Act the construction of houses of such type and size as is specified in this section and completed before the first day of October, nineteen hundred and twenty-five;" By sub-s. 2: "The houses in respect of which contributions may be given under this section shall be either—(*a*) a two-storied house with a minimum of six hundred and twenty and a maximum of nine hundred and fifty superficial feet; or (*b*) a structurally separate and self-contained flat or a one-storied house with a minimum of five hundred and fifty and a maximum of eight hundred and eighty superficial feet; such measurements being calculated in accordance with rules made by the Minister; . . . ."

By s. 1, sub-s. 1, of the Housing (Financial Provisions) Act, 1924, it was provided (inter alia) that, subject to the provisions of that Act, so much of the Housing, &c., Act, 1923, as limited the operation of s. 1 of the Housing, &c., Act, 1923, to houses completed before the first day of October, nineteen hundred and twenty-six, should cease to have effect.

The terms and conditions imposed by the plaintiff council provided (inter alia) that the assistance should be a lump sum grant of 75*l.* for each house, and that the selling price of the house must be subject to the approval of the council, which would take into consideration the fact that a subsidy had been given. The defendants, who were builders, applied twice for assistance in accordance with the terms and conditions, each time in respect of two houses. The applications, which were on printed forms, stated that the selling price of each house was to be 625*l.*, including the subsidy, and the rental 14*s.* a week. In the certificate of qualification for the subsidy issued in respect of the houses which were the subject of the first application was the condition: "The subsidy will be paid on the condition that the selling price or value of each house shall not exceed 550*l.*, or, together with the subsidy, 625*l.*;" and in a like certificate issued later in respect of the houses which were the subject of the second application was a condition identical save that it referred to "the selling price or value of each house, with land as shown on approved plans," and stipulated that the rent should not exceed 14*s.* a week.

The defendants completed the houses and the plaintiff council paid to them four sums of 75*l.* by way of a lump sum grant in respect of each house. The defendants sold three of the houses for more than 550*l.* each. One of the purchasers complained to the Ministry of Health that he had been compelled to pay more than the maximum price fixed by the plaintiff council. By this action the plaintiff council, which had failed in the circumstances to obtain repayment of the sums from the Minister of Health, asked for a declaration that the defendants were liable to repay to it three of the sums of 75*l.*, and for payment of the sums.

A. Grant K.C. and *H. O. Danckwerts* for the plaintiff council. The action is brought under the Housing, &c., Act, 1923, ss. 1 and 2, and the Housing (Financial Provisions) Act, 1924, s. 1, sub-s. 1. The object of those Acts is to help the provision of houses for the working classes. The condition as to "selling price or value" in the plaintiff council's certificates of qualification for the subsidy is clearly intended to limit the price at which the houses may be sold to purchasers from the defendants. If it is not so intended it has no meaning whatever: for to contend that "selling price or value" means, not "price or value obtained on sale," but "price which the houses may be expected to realize, or value which they may be estimated to have, in the market," is to assert that the condition was not intended to place any restriction on the defendants, who, accordingly, were to be entitled to sell the houses for the highest prices they could obtain, thus in all probability defeating the object of the Acts. What was intended was, of course, that the defendants should not obtain from any purchaser more than the price named, in this case 550*l.*, a figure which made it possible for the classes contemplated by the Acts to derive the intended benefit. The defendants accepted the three subsidies and thus bound themselves to abide by the condition as to selling price. They ought, therefore, having broken that condition, to repay the subsidies to the plaintiff council.

J. Norman Daynes K.C. and *R. P. Mahaffy* for the defendants. The condition in the certificates of qualification for the subsidy does not say that the houses "shall not be sold for more than 550*l.* because they are subsidy houses." Even if the provision had been in those terms, it would not have helped the plaintiff council very much, for the defendants could have sold the houses to a company in which they held all the shares and the company could have sold the houses at any price. If the matter were being considered in terms of a contract, the applications for assistance would each have been an offer, and the giving of a certificate would have been, not an acceptance, because the certificate contained fresh terms, but a counter offer. The defendants were entitled to sell at any price they chose, provided that they satisfied the plaintiff council that each house had a maximum selling value of 550*l.* Even if the view put forward on behalf of the plaintiff council is right, there was no guarantee that a person who wanted a house to live in would be able to buy it for 550*l.*, because the houses might have been bought by some one as an investment. In the present case there is no contract. There is simply a gift on a condition: that is how the subsidy is described. The plaintiff council could have made the transaction a contract if it had so desired. A condition restraining alienation is bad: *In re Elliot.* (1) It would be bad as a condition of a grant by an individual, and it is not made any better by being a condition of a grant by an urban district council under the Housing, &c., Act, 1923. The fact that the Minister of Health has approved the condition makes no difference. Conditions of this kind are wholly invalid if they imply a limitation on the selling price. Also, it was quite definitely the plaintiff council's duty to satisfy itself that the character and nature of each house was such as to fix the selling price at 550*l.* It was the duty of the surveyor to the council to do that work for the council.

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(1) [1896] 2 Ch. 353.

The condition in the certificates of qualification for the subsidy is not the kind of condition contemplated by s. 2, sub-s. 4, of the Housing, &c., Act, 1923. What the Legislature was there thinking of was the kind of condition that may very often be in a lease or in a conveyance of freehold property. Financial conditions were not contemplated in that sub-section.

The authority with regard to the enforcement by a corporation of a contract for sale is *Oxford Corporation* v. *Crow.* (1) In the present case the fact that the plaintiff council pursued such a course of procedure as to indicate that it considered nobody bound until the subsidy had been paid shows clearly that it was not relying on any contract.

Grant K.C. and *Danckwerts* were not called upon to reply.

MAUGHAM J. This is a case of some importance to the parties and also, it may be, to the country, and I will begin first by stating the facts so far as I think they are relevant. [His Lordship then stated the facts, and continued :] Now a number of questions have been argued, quite properly, on behalf of the defendants. The first point suggested is this, that the phrases used in specifying the conditions, that is to say, such words as : "The subsidy will be paid on the condition that the selling price or value of each house shall not exceed 550*l.*," point only to the quality of the houses in question and have no reference whatever to the price at which the houses can be sold on a first sale by the builder who gets the subsidy. It is said that that view of the true

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(1) [1893] 3 Ch. 535.

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meaning of the words is supported by a consideration of s. 2, sub-s. 4, of the Housing, &c., Act, 1923, and that the conditions which may be imposed by the local authority are conditions ejusdem generis with the conditions therein specifically mentioned. I can see no ground for the application of the rule of ejusdem generis in the sub-section. I think the phrase "subject to such conditions as the local authority may with the approval of the Minister impose" is quite wide enough to cover a condition that a house built with the assistance of the subsidy shall not be sold on a first sale by the builder for a price exceeding a definite sum. I would not assert that the condition is very aptly worded, but I would observe this, that if counsel for the defendants is right, and all that this means is that "the selling price" refers only to the value of the house and does not import the maximum price at which the builder can sell the house, then the whole of the provisions seem to be nugatory, and the system provided for by the Housing, &c., Act, 1923, is reduced almost to a farce. It is common knowledge that the reason for the granting of these forms of assistance was that there was a great shortage of houses for the working classes, and it was therefore desirable that local authorities should, with the approval of the Minister of Health, be enabled to subsidize the building of such houses out of public funds. Now, if a row of houses is erected by a builder and, after an application for a grant has been accepted and the certificate of completion has been obtained, a builder is in a position to say: "I have built the houses so that their" selling price "is 550*l.*, but I am going to take advantage of the shortage of such accommodation and to charge an extra 100*l.* on each house"—if he is entitled to do that, the whole thing becomes of the nature of a farce: because, in that case, the builder will pocket the subsidy, and the working classes, who are intended to be benefited by the scheme, will get no benefit at all. Therefore I am very unwilling to accept this as the true construction of the condition in question. I am not sure how far I am entitled to look at the circulars sent by the Ministry of Health to the plaintiff authority in order to see what sort of conditions they have imposed, but I may add that the circulars do impose such a condition, that the price at which the property shall be sold shall not exceed a certain sum. The condition "The selling price or value of each house shall not exceed 550*l.*" seems to me to be badly expressed if "the selling price" there means no more than "the value," and on the whole I think the circumstances surrounding the transaction justify the view that the words indicate the maximum price at which the builder who has erected the house with the subsidy from the public funds will be entitled to sell the house.

Then there is an entirely different point. It is said, supposing there was such a condition as I have found there was, namely, that the condition on which the 75*l.* is paid on a particular house is that the builder will not sell the house at a price exceeding 550*l.*, that, regarded as a common law condition attached to land, would be repugnant and void. With that I am inclined to agree, but I see no difficulty in coming to the conclusion that I ought to regard the case as consisting of an offer of 75*l.* by the plaintiff authority, to be paid out of public funds to the builder, if he agrees that the selling price of the house is not to exceed 550*l.*: in other words, it amounts to an ordinary contract inter partes. It is true that in the statement of claim that way of putting it is not very distinctly adumbrated, but all the facts are stated from which such a conclusion of law can be derived.

In my opinion, then, when the defendants accepted the 75*l.* in respect of each of these three houses, they agreed with the plaintiff authority that they would perform the condition, that is to say, that they would not sell any one of the three houses at a sum in excess of 550*l.* They were not, it is true, bound to sell the houses, and this case is an example of how these Acts sometimes operate. The defendants, having built altogether six houses, took one for each of themselves and another for a sister. There remained only three houses for the working classes, unless they are themselves to be regarded as in that class, and with regard to those three houses they managed to sell them for 650*l.* each. They were not bound to sell, and that no doubt is the reason for the phrase ". . . . value of each house shall not exceed 550*l.*," because the condition, as I read it, means this, that the applicants shall not fix a selling price at a figure exceeding 550*l.*, nor shall they be entitled to be paid the subsidy if the value of each house shall exceed 550*l.* That indicates that if an extravagant house is put up by a builder for himself or one of his relatives, and he does not intend to sell it, he shall not be entitled to the subsidy. I do not therefore agree with the view of the surveyor to the plaintiff authority that he was not in any way concerned to consider the value of one of these houses before granting the certificate of completion which justified the payment by the plaintiff authority of the subsidy in question.

There remains a final point which has been raised on behalf of the defendants, based on the fact that there was no contract under seal. If I am right in the view I take of the case, that point fails equally because, although it is true that a contract sought to be enforced by a corporation ought in general to be under seal, it has long been settled that the doctrine has no application if the contract has been in part performed or acted upon. In the present case the contract, so far as the plaintiff authority is concerned, has been completely performed, since it has paid in respect of these three houses the three sums of 75*l.* It has been unable, in view of the prices at which the three houses were sold, to obtain any grant from the Ministry in respect of those houses and, accordingly, my opinion is that the plaintiff authority is entitled to recover the sums of 75*l.* on the ground that the contract has been broken and the damages sustained by the plaintiff authority are the three sums of 75*l.* in question. Accordingly the plaintiff authority must have judgment for those three sums and the defendants must pay the costs of the action.

Solicitors: *Edwin Coe and Calder Woods, for R. D. Watson, Burnham-on-Sea; Ernest Bevir & Son.*

K. R. A. H.

THE WESLEYAN AND GENERAL ASSURANCE SOCIETY *v.* THE ATTORNEY-GENERAL.

LUXMOORE
J.

1932

Dec. 15, 21.

[1932. W. 1846.]

Insurance—Life Assurance Society—Industrial Life Assurance Department—Profits—Society's Private Act—Bonuses out of Profits in Industrial Department transferred to Ordinary Life Department—Assurance Companies Act, 1909 (9 *Edw.* 7, *c.* 49), *ss.* 3, 4 *and* 5; *Schedules—Wesleyan and General Assurance Society Act,* 1914 (4 *&* 5 *Geo.* 5, *c. clxvii.)—Industrial Assurance Act,* 1923 (13 *&* 14 *Geo.* 5, *c.* 8), *s.* 12, *sub-s.* 3 (*b*), *ss.* 14 *and* 17.

The plaintiff Society from its establishment in 1843 down to 1914 carried on (inter alia) the business of ordinary life assurance business. In 1878 the Society established an industrial life assurance department as a separate department with a separate fund on the terms that persons insuring in it were not entitled to share in any surplus or profits of the department. For some years before 1914 part of the surplus earned by the Society was applied in the payment of bonuses or additions to policies issued out of that department. Doubts having arisen whether the rules of the Society could legally permit this procedure, the Society in 1914 obtained a private Act of Parliament in order to remove these doubts. By this Act, after (inter alia) empowering the Society to give to any insured persons who might not perhaps be members of the Society a right to participate in the profits of the Society or in any particular department of it, and after providing for the creation of new separate departments distinct from the ordinary life assurance department, and the industrial life assurance department, (but that no persons assured in any department other than the existing ordinary life assurance department were to be members of the Society), it provided that the directors might carry to reserve out of the surplus or profits of any department such sums as they thought fit, provided that all sums so set aside should be applied to meeting the expense of establishing or providing deposits or funds required in connection with any new department thereafter to be established by the Society. The Act was also (inter alia) made subject to the Assurance Companies Act, 1909.

The Act further authorized certain rules: rule 63 provided for the annual investigation of the financial position of the Society; rule 64 dealt with profits and authorized the directors to carry such sums to reserve out of surplus as they thought fit, and the balance of any of the remaining surplus was to be known as the divisible profits; rule 65 permitted the directors to allocate the divisible profits in the payment of bonuses or conferring benefits upon persons insured in the industrial insurance department or any other department, insurance in which did not make such persons members of the Society; rule 66 provided that the balance of the divisible profits should, after certain deductions be divided by way of bonus among members holding with-profit policies on certain terms.

The Society having made in its industrial department during the years 1927, 1928, 1929 and 1930 substantial profits, one-fifth of the divisible profits of that department for each year was transferred to the ordinary life department and divided by way of bonus among members holding with-profit policies in the Society.

The Industrial Assurance Commissioner, having stated that in his opinion these transfers infringed the provisions of the Assurance Companies Act, 1909, s. 3, sub-s. 2, directed the Society to retransfer back a specified sum from the life fund of the ordinary department to the life fund of the industrial department.

The Society, having denied the Commissioner's contention, brought the present proceedings and alleged that these transfers by them were not an infringement of the Act of 1909; and that what they had done was in strict accordance with their own private Act and the rules thereunder:—

Held, that on the true construction of the Assurance Companies Act, 1909, as applied to industrial life assurance by the Industrial Assurance Act, 1923, there was nothing to prevent the distribution by the plaintiff Society among its members of such part of the surplus of the industrial life assurance fund as it might determine to distribute in accordance with its rules 63 to 66 inclusive, and that there was no obligation on the part of the Society to comply with the directions of the Industrial Assurance Commissioner.

THE following statement of facts is taken substantially from the judgment of the learned judge.

In this action most of the material facts are to be found in the preamble to a private Act of Parliament which was obtained by the plaintiff Society in 1914. The short title is the "Wesleyan and General Assurance Society Act, 1914," and it will be hereafter referred to as the "Society's Act."

From the preamble to this Act it appears that the Society was established in the year 1843 under the laws then in force relating to friendly societies. Its original name was "The Wesleyan Provident Assurance Society." The objects for which it was established were to provide by mutual assurance for the relief of members in the case of sickness, accidents, and infirmity, for securing annuities and for ordinary life assurance.

From the date of its establishment the business of the Society consisted in part of ordinary life assurance business and in part of insurance against sickness. These two classes of business were from the commencement carried on in separate departments with separate funds. The persons who took out policies in either department became members of the Society, and as such became entitled under the rules to participate in the profits earned by the Society. The sickness department has since 1901 been in the position of a closed fund, and since that date no further policies have been issued by it. In the year 1878 the Society opened a new department for effecting policies of assurance on the lives of persons belonging to the industrial classes for small premiums paid at frequent intervals. This department was from its inception also carried on as a separate department with a separate fund. It achieved considerable success and has been carried on continuously and is still being carried on. It was carried on down to the date of the passing of the Society's Act upon the terms that persons insuring in it did not become members of the Society and were not entitled to share in any surplus or profits of the department, such surplus or profits being distributable under the rules of the Society by its directors in their discretion among the ordinary life assurance and sickness departments of the Society or either of them.

For some years immediately preceding the passing of the Society's Act part of the surplus determined by each annual investigation into the financial position of the Society was applied on the recommendation of the consulting actuary of the Society in the payment of bonuses or additions to policies issued out of the industrial life assurance department complying with certain prescribed conditions. This practice made insurance in the industrial life assurance department attractive and was beneficial to the Society. Shortly before the passing of the Society's Act doubts arose whether the rules of the Society authorized the application of any part of the surplus of the Society arising from the separate departments, or any of them, in payment of bonuses or additions in respect of policies issued out of the industrial life assurance department. Among the objects aimed at by the promotion and passing of the Society's Act was the removal of these doubts, the express authorization of the payment of such bonuses and additions in the future, and the confirmation of the past payments. The Society's Act, in addition to the above objects, provided for the incorporation of the Society, for the amendment of its rules, and the extension of its powers.

The following sections of the Society's Act are material to the consideration of this action. Sect. 2 is the interpretation section. It contains a definition of the word "member" or the phrase "member of the Society" as meaning, "a person (whether a minor or of full age) who is either insured in the existing sickness department or is an original grantee from the Society of a subsisting policy of insurance in the ordinary life assurance department," fulfilling certain conditions which it is not necessary to mention specifically. The definition concludes with these words: "but shall not include any person insured in the existing industrial life assurance department or in any other new department hereafter established by the Society." Sect. 4 provides for the incorporation of the Society. Sect. 5, sub-s. 1, sets out the objects of the Society as being the granting of all such assurances with or without the right to participate in the surplus or profits of the Society for the payment of money on the happening of any contingencies or events whether dependent on or connected with life or not, and the granting of all such annuities as may by law be granted. The sub-section ends with an express prohibition of the grant of any further assurances against sickness or otherwise out of the existing sickness department of the Society. Sect. 6 defines the powers of the Society. I need only refer to those defined in sub-ss. 6 and 7. Sub-s. 6 empowers the Society "to give to any persons or class or section of persons who are insured or insure or have other dealings with the Society and notwithstanding that such persons or class or section of persons may not be members of the Society a right to participate in the profits of the Society or in the profits of any particular branch or department of its business either equally with other persons or classes or sections of persons or otherwise or any other right privilege advantage or benefit." Sub-s. 7 empowers the Society to benefit employees or ex-employees of the Society and their dependants and connections by the establishment of trust funds or by similar means.

Sect. 7, after expressly prohibiting further assurances out of the existing sickness department, provides: " . . . . and so long as and whenever the Society carries on any class or classes of business other than the business of ordinary life assurance as carried on in the existing ordinary life assurance department such other class or classes of business shall be carried on in one or more separate departments and the existing industrial life assurance department and every new department hereafter established shall always remain and be a separate department both from the existing ordinary life assurance department and from the existing sickness department and no person for the time being assured in any department other than the existing ordinary life assurance department and the existing sickness department shall (whether or not he is entitled under the terms of his assurance to share or participate in the surplus or profits of the Society or of the department in which he is insured) be by virtue of such assurance a member of the Society or entitled as such to any voice in the management of its affairs." Sect. 24 provides for the investment of the Society's funds. Sect. 25 deals with reserve funds. It provides by sub-s. 1 that: " Out of any surplus or profits of the Society or of any particular department thereof determined by any annual or other investigation into its financial position made pursuant to the provisions of any public Act relating to assurance companies for the time being in force or to the rules the directors may set aside and carry to any reserve or reserves whether general or special such sums as they think expedient." Sub-s. 2 provides that: " All sums so set aside to any reserve and also all sums standing at the date of the passing of this Act to the credit of any reserve or special fund of the existing society shall at the discretion of the directors be applicable for meeting the expense of establishing making known or providing deposits or funds required in connection with any new department hereafter established by the Society"; and for various other purposes expressed in the sub-section, including the equalization of bonuses. Sect. 27 provides that: "whenever the event shall happen upon which the benefit expressed in any policy issued by the Society arises the person entitled to such benefit shall upon proof satisfactory to the directors of such event having happened and of his title to such benefit become a creditor on the funds of the Society applicable to such policy for the sum of money payable under and by virtue thereof." Sect. 34 provides that the rules in the Schedule shall be the rules of the Society, and it also provides for their alteration. Sect. 37 provides that: "Nothing in this Act shall be deemed to exempt the Society from the provisions of the Collecting Societies and Industrial Assurance Companies Act, 1896, affecting industrial assurance companies or the Assurance Companies Act, 1909, so far as the same are applicable to the Society or from the provisions of any general Act passed during the present or any future session of Parliament affecting assurance companies formed previously to the passing thereof."

The only rules to which it is necessary to refer are those under the heading: "Periodical Investigation and Distribution of Profits." They are numbered 63 to 66 inclusive. Rule 63 provides for an annual investigation of the financial position of the Society by a duly qualified actuary, including a valuation of the liabilities of the Society. It contains this provision: "If it shall appear from the report of the actuary that the funds and assets of the Society or of any particular department of the Society have accumulated so as to be more than sufficient to discharge the whole of the claims made or liable to be made thereon then the surplus shall be dealt with as hereinafter provided." Rule 64 deals with profits. It is in these terms: "The directors may set aside out of such surplus and carry to any reserve or reserves whether special or general pursuant to section 25 of the Society's Act such sums as they think fit and may also carry forward any part of the said surplus which they think fit without carrying the same to reserve and the balance of such surplus remaining after setting aside and carrying forward such sums as aforesaid shall be and is herein-after referred to as the divisible profits of the Society and the declaration of the directors as to the amount of the divisible profits of the Society shall be final and conclusive against the members and other persons if any entitled to participate in such profits." Rule 65 deals with the allocation of profits. It provides that: "The directors may allocate or apply any part of the divisible profits which they think fit (or which under the terms of any policies issued or any rules or regulations from time to time made by the directors ought to be allocated or applied for the purpose) towards or in providing for or making any payments or bonuses to or allowing or conferring any benefits privileges or advantages to or upon the persons insured in the industrial insurance department of the Society (or any other department of the Society insurance in which does not constitute the persons effecting such insurances members of the Society) or any class or classes of such persons as they think fit Provided always that the sum so allocated or applied towards or in making payments or bonuses to or allowing or conferring other benefits upon the persons or any class or classes of the persons insured in any such department as aforesaid shall not in any event exceed the profits earned by such department less a proportionate part of all sums carried to reserve or reserves or carried forward out of the total surplus or profits of the Society." Rule 66 provides that: "The balance of the divisible profits remaining after deducting any part thereof allocated or applied under the last preceding rule shall be divided by way of bonus amongst the members of the Society holding with-profit policies in the Society more than two years in force by allotting to each such member his due share in respect of such policy. . . ." The rule contains a provision as to the method of appropriation and a prohibition on any division or distribution unless it shall have been duly recommended or certified as just and equitable by the actuary.

During the years 1927, 1928, 1929 and 1930, the industrial department of the plaintiff Society, having made, as was alleged by them, substantial profits, one-fifth of the divisible profits of that department for each of the said years was transferred to the ordinary department and divided by way of bonus amongst members holding with-profit policies in the Society in accordance, as was contended, with rule 66. The profits so transferred amounted to over 70,000*l.*

By letters dated July 3 and 17, 1931, the Industrial Assurance Commissioner asserted that these transfers infringed the provisions of the Assurance Companies Act, 1909, s. 3, sub-s. 2, and called on the plaintiff Society to re-transfer these sums back from the ordinary fund to the industrial fund. After some correspondence the Commissioner, acting pursuant to the Industrial Assurance Act, 1923, s. 17, sub-s. 2, by a written direction dated March 4, 1932, directed the plaintiff Society to transfer a specified sum of over 61,000*l.* within fourteen days from the said date from the life fund of the ordinary department to the life fund of the industrial department of the plaintiff Society. His contention was that the transfers which had been made by the Society were an infringement of the Assurance Companies Act, 1909, s. 3, sub-s. 2.

The plaintiff Society having declined to carry out the Commissioner's direction on the ground that they were unable to accept his interpretation of the section of the Act, the present proceedings were instituted whereby the Society claimed declarations that upon the true construction of the Assurance Companies Act, 1909, s. 3, as applied by the Industrial Assurance Act, 1923, s. 12: (*a*) the direction of the Industrial Assurance Commissioner of March 4, 1932, was ill-founded and that they were under no obligation to comply with it, and (*b*) that they were entitled (after paying due regard to rules 63, 64, 65 and 66 above set out) (1.) to carry sums from the surplus of their industrial assurance fund to any reserve or reserves whether special or general under s. 25 of their Act and rule 64 of their Rules; and (2.) to divide the balance of the divisible profits of the industrial assurance fund by way of bonus among the members of the Society under rule 66 of their Rules.

Gavin Simonds K.C., *W. Gordon Brown*, and *G. R. Blanco White* for the plaintiffs. The only issue is the construction of the Assurance Companies Act, 1909, taken in conjunction with the plaintiff Society's own private Act. What the private Act really contemplates is the fact of a number of persons who are members of a Society by virtue of having ordinary life policies carrying on the business of insurance in its various branches and in such a way as to earn a profit from all the branches of insurance. On the facts before the Court, what has been done by the Society is wholly within their statutory powers. Sects. 12 and 14 of the Industrial Assurance Act, 1923, have to be considered in connection with the plaintiff Society's contention.

With regard to the Assurance Companies Act, 1909, it does contemplate insurance companies carrying on their business with a view to profit. It is submitted that it really does not matter in this case whether persons who are members and carry on different classes of assurance business are members by virtue of the fact that they have so many shares registered in their names, or whether by the constitution of their particular Society they become members and are authorized to carry on all manner and classes of assurance business by virtue of having certain classes of policy. The written direction of the Commissioner is founded on s. 3 of the 1909 Act (1), and he has contended that although an assurance company carries on business for profit, yet it may

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(1) Assurance Companies Act, 1909, s. 3: "(1.) In the case of an assurance company transacting other business besides that of assurance or transacting more than one class of assurance business, a separate account shall be kept of all receipts in respect of the assurance business or of each class of assurance business, and the receipts in respect of the assurance business, or, in the case of a company carrying on more than one class of assurance business, of each class of business, shall be carried to and form a separate assurance fund with an appropriate name: Provided that nothing in this section shall require the investments of any such fund to be kept separate from the investments of any other fund.

"(2.) A fund of any particular class shall be as absolutely the security of the policy holders of that class as though it belonged to a not apply any part of the separate fund in the distribution of profit. If one looks at the first few lines of sub-s. 2 of that section beginning " a fund of any particular class," it must mean that a company carrying on the business of—let us say ordinary life—assurance for profit, makes a profit and distributes that profit. If one continues that sub-section down to " . . . . had the business of the company been only that of assurance of that class . . . . ,"—that clearly cannot mean that whatever the surplus may be upon an estimation of the value of the assets and an actuarial calculation of the liabilities, still that fund is to remain and be used for no other purpose than the satisfaction of the contracts into which the company has entered in respect of that class of business.

Sects. 4 and 5 are also necessary to consider (1), and also the Schedules, especially the Fourth Schedule which has to do with the actuary when he makes his valuation. The

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company carrying on no other business than assurance business of that class, and shall not be liable for any contracts of the company for which it would not have been liable had the business of the company been only that of assurance of that class, and shall not be applied, directly or indirectly, for any purposes other than those of the class of business to which the fund is applicable."

(1) Sect. 4: " Every assurance company shall, at the expiration of each financial year of the company, prepare—

(*a*) A revenue account for the year in the form or forms set forth in the First Schedule to this Act and applicable to the class or classes of assurance business carried on by the company;

(*b*) A profit and loss account in the form set forth in the Second Schedule to this Act, except where the company carries on assurance business of one class only and no other business;

(*c*) A balance sheet in the form set forth in the Third Schedule to this Act."

Sect. 5: " (1.) Every assurance company shall, once in every five years, or at such shorter intervals as may be prescribed by the instrument constituting the company, or by its regulations or bye-laws, cause an investigation to be made into its financial condition, including a valuation of its liabilities, by an actuary, and shall cause an abstract of the report of such actuary to be made in the form or forms set forth in the Fourth Schedule to this Act and applicable to the class or classes of assurance business carried on by the company.

" (2.) The foregoing provisions of this section shall also apply whenever at any other time an investigation into the financial condition of an assurance company is made with a view to the distribution of profits, or the results of which are made public."

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fund which one finds in the Schedules is ascertained annually by valuation. When one sees the amount of the life insurance fund at the beginning of the year, that is something which is arrived at after all payments, including the distribution of proper profits, have been made out of it, so that at the end of the year the fund is something of which—if there has been a profit—that profit forms no part.

[LUXMOORE J. Really the question to be determined is, is the profit part of the fund or not ?]

[The balance-sheet of the Society for 1927 was considered.]

It has never been decided and it is very difficult in the liquidation of a company to say what a "fund" really is, and especially so as used in this Act.

Is there really anything in the language of s. 3, sub-s. 2, which makes what this Society has done illegal ? (1)

Reading the first few words in sub-s. 2, it is submitted, you cannot read that as a prohibition upon the distribution of profit, because the Act ex hypothesi is dealing with the case of an assurance company which is carrying on business for profit. This applies also to the last words of the subsection. The fund which is available for the holders of a particular class shall not be used for the purpose of the policy holders of another class. There is nothing illegal in what the Society has done.

Sir F. Boyd Merriman S.-G. and *Stafford Crossman* for the defendant. Sect. 3 of the Act of 1909 says the fund is composed of receipts; manifestly, therefore, you are to pay out of the fund anything for which you are liable or which may properly be paid out of the fund. In the present case, of course, there is an insurance company carrying on two or more classes of business, but that the expenses come out of the fund constituted by the receipts is shown by s. 12, sub-s. 3 (*b*), of the Industrial Assurance Act, 1923. (2) The fund is the sum of receipts out of which any of the liabilities appropriate to that fund are to be met.

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(1) See note (1) ante, pp. 599-600.

(2) Industrial Assurance Act, 1923, s. 12, sub-s. 3 (*b*): "Where any expenses of management, or interest or dividends from investments, or sums on account of depreciation of securities, are apportioned between the industrial assurance business and any other business transacted by the company the auditor shall include in his report a special report as to the propriety or otherwise of the apportionment:"

The fund is not a net figure, it is the whole of the receipts, and by implication out of that of course the liabilities are to be paid. If money is paid in in respect of the ordinary life assurance and the industrial life assurance they form part of the fund but the accounts are separate. They form a separate fund, and out of that fund payments have to be made. The thing which forms the fund out of which any given policy holder is paid is the accumulation of the receipts. It is the receipts of that business; and the way in which the profits shall be distributed out of any fund is that it is to be a distribution to those who are entitled to that fund, not to some other fund.

It is submitted that the profits of an insurance business cannot possibly be anything but that which results at any given moment on an estimate, accurate or inaccurate, of the liabilities of the company. In the case of a life insurance business the crucial valuation is the estimate of what is required to meet the liabilities to policy holders, it means a very accurate estimate of what their estimate of life and other matters is, as well as many outside things which have to be taken into account by actuaries. This estimate in arriving at the profits of an insurance company is largely based on the particular method on which the actuary values.

The fund is not to be used to pay something to people who are not in the class of insurance to which the fund is applicable. The fund of a particular society may not be used to pay that to which as a matter of liability or as a matter of grace the members of another society may be entitled. The Act of 1923 has altered the law as regards the methods by which this Society had up to then treated the funds in their hands; the old framework of machinery has been changed.

Gavin Simonds K.C. in reply. It is still urged in spite of the defendants' argument that the Act of 1909 does contemplate the distribution of profits. A company carrying on industrial assurance business, together with other forms of insurance business, is entitled to distribute the profits of its industrial assurance business to its shareholders if its constitution admits of it.

[A discussion took place as to the exact form of the declaration sought by the plaintiffs.]

Cur. adv. vult.

1932. Dec. 21. LUXMOORE J. The Wesleyan and General Assurance Society has brought this action in order to have the question determined whether any part of the profits earned by the Society in carrying on industrial assurance business can lawfully be applied in providing bonuses and benefits for its members not being holders of industrial assurance policies.

There is no dispute of fact. Most of the material facts are set out in the preamble to a private Act of Parliament obtained by the Society in the year 1914, the short title of which is the Wesleyan and General Assurance Society Act, 1914 (4 & 5 Geo. 5, c. clxvii.). I will refer to this as the Society's Act. [His Lordship stated the facts as substantially set out above :] Obviously the Society's Act was not passed to legalize the distribution among the members of the Society of the whole or any part of the profits earned in the industrial life assurance department. It was passed for quite a different purpose—namely, to remove any doubt as to the validity of the distribution of some part of the surplus profits of the Society amongst policy holders who were not members of the Society, and in particular amongst the holders of policies issued out of the industrial life assurance department.

Since the passing of the Society's Act the Society has—until shortly before the institution of this action—as the result of the annual investigation under rule 63, carried to its profit and loss account for distribution amongst the holders of with-profit policies under rule 66 some part of the surplus or profits earned in its separate departments, including the industrial life assurance department. The Society has for some years past carried on, and still is carrying on, as separate departments of its business and in addition to the ordinary life assurance and industrial life assurance departments, fire insurance, accident insurance and employers' liability insurance. In each of the years 1927, 1928, 1929, and 1930, it was ascertained that as the result of the annual investigation under rule 63 there was a substantial surplus in the industrial life assurance department available to be dealt with as profit under rules 64, 65 and 66. In each of those years three-fifths of the surplus was allocated for the benefit of holders of policies effected in the industrial life assurance department, one-fifth was allocated for the benefit of employees under the description "outdoor staff" of the Society, and the remaining one-fifth was transferred to the ordinary life assurance department for distribution by way of bonus amongst the members holding with-profit policies in the Society in accordance with the provisions of rule 66. The amount transferred to the ordinary life assurance department from the surpluses in the four years mentioned of the industrial life assurance department is 71,353*l.* 13*s.* 4*d.*

In July, 1931, the Industrial Assurance Commissioner raised the question of the legality of the transfers to the ordinary life assurance department. After some correspondence on the subject the Industrial Assurance Commissioner, under the powers conferred on him by the Industrial Assurance Act, 1923, s. 17, sub-s. 1, appointed an inspector to examine and report on the affairs of the Society, and as the result of the report the Industrial Assurance Commissioner, on March 4, 1932, under the powers conferred on him by s. 17, sub-s. 2, of the same Act, directed that the sum of 61,353*l.* 13*s.* 4*d.* should be transferred within fourteen days from that date from the fund of the ordinary life assurance department to the fund of the industrial life assurance department. The sum of 61,353*l.* 13*s.* 4*d.* is the balance of the said sum of 71,353*l.* 13*s.* 4*d.* remaining after crediting the ordinary life assurance department with the repayment of a sum of 10,000*l.* to the industrial life assurance department in respect of a transfer to general reserve previously made out of the surplus of the industrial life assurance department. The Society declined to comply with this direction.

On May 10, 1932, the Society instituted the present action against His Majesty's Attorney-General for a declaration that the Society was under no obligation to comply with the direction, and also for a declaration in effect that the Society was entitled to deal with the surplus or profits of the industrial life assurance department in accordance with rules 63, 64, 65 and 66 of the Society's rules as set out in the Schedule to the Society's Act.

It was agreed before the writ was issued that no objection would be taken to the constitution of the action. It was admitted at the Bar on behalf of the Attorney-General that no complaint could properly have been made in respect of the matters dealt with in the written direction of the Industrial Assurance Commissioner if the Industrial Assurance Act, 1923, had not been passed. That Act provides that industrial assurance business shall not be carried on except by certain specified companies and societies. It is admitted that the Society is within this class. Industrial assurance business is defined as being the business of effecting assurances upon human life, premiums in respect of which are received by means of collectors, with certain specific exceptions. I need not trouble with them, for it is common ground that the Society is carrying on industrial assurance business, and is entitled so to do under the last mentioned Act. Sect. 2 of the Act constitutes the Chief Registrar of Friendly Societies as the Industrial Assurance Commissioner, and invests him with certain powers and duties. Sect. 12, sub-s. 1, provides that industrial assurance business shall for the purposes of the Assurance Companies Act, 1909, be treated as a separate class of assurance business, and accordingly a separate deposit shall be made in respect of the business as required by s. 2 of that Act. Sub-s. 3 of the same section provides that in its application to industrial assurance business the Assurance Companies Act, 1909, shall have effect with certain modifications. The modifications material to be considered in the present case are contained in paras. (*a*) and (*b*). Para. (*a*) is as follows: "The provisions relating to life assurance business shall apply also to industrial assurance business with the substitution of references to 'industrial assurance business' and 'the industrial assurance fund' for references to 'life assurance business' and 'life assurance fund.'" Para. (*b*) provides that: "Where any expenses of management, or interest or dividends from investments, or sums on account of depreciation of securities, are apportioned between the industrial assurance business and any other business transacted by the company the auditor shall include in his report a special report as to the propriety or otherwise of the apportionment." The only other section of the Act to which I need refer is s. 14, which provides that "the provisions of this Act shall have effect notwithstanding anything in the memorandum or articles of association or rules or special Act of any industrial assurance company." The result of the Act is to add industrial assurance business to the five special classes of insurance business specified and dealt with in the Assurance Companies Act, 1909.

It is contended on behalf of the Attorney-General that the effect of this provision is to prohibit the distribution in the present case among the members of the Society of any part of the annual surplus in the industrial life assurance department ascertained in accordance with the provisions of rule 63.

The solution of the question, whether this contention is well founded or not, depends mainly on the construction to be placed on s. 3 of the Assurance Companies Act, 1909. Sub-s. 1 of that section provides that "in the case of an assurance company transacting other business besides that of assurance or transacting more than one class of assurance business, a separate account shall be kept of all receipts in respect of the assurance business or each class of assurance business, and the receipts in respect of the assurance business, or, in the case of a company carrying on more than one class of assurance business, of each class of business, shall be carried to and form a separate assurance fund with an appropriate name: Provided that nothing in this section shall require the investments of any such fund to be kept separate from the investments of any other fund." Sub-s. 2 provides that "a fund of any particular class shall be as absolutely the security of the policy holders of that class as though it belonged to a company carrying on no other business than assurance business of that class, and shall not be liable for any contracts of the company for which it would not have been liable had the business of the company been only that of assurance of that class, and shall not be applied, directly or indirectly, for any purposes other than those of the class of business to which the fund is applicable."

The argument put forward on behalf of the Attorney-General is that the section requires all receipts of an assurance company from one class of assurance business to be segregated, at any rate in the books of the company; and that nothing may be debited against those receipts except claims in respect of policies issued in respect of that class of business and the proper proportions of expenses of management attributable to that particular class of business, and in particular that nothing can be taken from or debited to those receipts or the fund constituted thereby in respect of profits earned in carrying on the particular class of business except for the purpose of bonus addition or benefit to holders of policies issued in respect of that class.

If this contention is correct it is plain that, in the case of an insurance company with liability limited by shares and carrying on more than one class of insurance business, no part of the profits earned in carrying on a particular class of business affected by s. 3 of the Assurance Companies Act, 1909, could ever be made available for payment to its shareholders by way of dividend, because dividend can only be paid out of profit, and profit in the case of an insurance company can only be ascertained after deducting outgoings, expenses and estimated liabilities from receipts whether from premiums or from the income derived from and accretions to invested funds. There can be no difference in the case of an insurance company carrying on several kinds of assurance business, including ordinary life assurance business and industrial life assurance business, between the position of the receipts from life assurance business and those from industrial life assurance business. The whole argument is based on the contention that the section requires all the receipts from a particular class of insurance business to be segregated. I agree that if the section is taken by itself, and the words in it are strictly construed in their prima facie literal meaning, there is much to be said for this view; but I do not think this is the correct method of construing the Act. To arrive at the true construction of an Act of Parliament it is necessary to consider the whole Act and not only the words used in a particular section. It is also necessary to consider what was the object to be effected by the Act. The object of the Assurance Companies Act, 1909, was to consolidate and amend and extend to other companies carrying on assurance or insurance business the law relating to life assurance companies. At the time of the passing of the Act, and for many years before, assurance companies were and had been carrying on insurance business for profit, and were and had been distributing those profits among their shareholders or constituents according to their constitution. The object of the Act was not to prevent assurance companies from distributing profits; it was to provide security for the policy holders in each particular class. The Act itself clearly contemplates that profits may be distributed, for it provides how an insurance company's accounts shall be kept and for the actuarial valuation of its liabilities. Sect. 4 of the Act provides that every assurance company shall, at the expiration of each financial year of the company, prepare (*a*) a revenue account, (*b*) a profit and loss account, and (*c*) a balance-sheet. Each of these accounts is to be in the appropriate prescribed form, and such forms are set out in detail in the Schedules to the Act. Sect. 5 provides for an actuarial investigation, report and valuation, and again there is a prescribed form set out in a Schedule to the Act. Sub-sect. 2 of this section provides that the actuarial investigation, valuation and report shall be made whenever an investigation into the financial condition of an assurance company is made with a view to the distribution of profits. The Act also contains provisions under which shareholders and policy holders are entitled to have copies of accounts, balance-sheets, and the abstract of the actuarial report and statement. A careful consideration of the forms of account set out in the Schedules to the Act make it clear that the ascertainment of surplus or profit in respect of each particular class of business is contemplated by the Act and that profit and loss is clearly provided for. Moreover, in the statement applicable to life assurance business to be made by the actuary respecting the valuation of policies set out in the Fourth Schedule of the Act, it is expressly provided that the statement should show the principles on which the distribution of profits among shareholders and policy holders is made ; and that there should also be a statement of the results of the valuation showing the total profit made by the company and how it is to be allocated as between policy holders, shareholders and reserve fund, and how much is carried forward unappropriated. I refer particularly to paras. 8 and 9 of Form A in the Fourth Schedule. Moreover, it is to be observed that there is no express prohibition in the Act against deducting from any assurance fund any profit which it is desired to distribute amongst those entitled to profits. All that is said is that each particular fund is to be the security of the policy holders interested in the particular class of assurance business to which it is applicable. The Act provides for valuation of liabilities and assets, and it is, I think, obvious that one of the purposes is to ascertain whether the security is sufficient or not. If it is found to be sufficient, the Act, as the forms of account show, contemplates a distribution out of any surplus amongst shareholders and policy holders in accordance with the constitution of the particular company concerned.

In my judgment it would be entirely contrary to the object of the Act and its true construction, when read in conjunction with the forms of account and the other forms set out in the Schedules, to hold that the surplus or profit in respect of a particular assurance fund ascertained in the manner required by the Act and which it is determined to distribute forms any part of that fund. I hold that on the true construction of the 1909 Act, as applied to industrial life assurance by the Industrial Assurance Act, 1923, there is nothing to prevent the distribution by the Society among its members of such part of the surplus of the industrial life assurance fund as it may be determined to distribute in accordance with the provisions of rules 63 to 66 inclusive. I further hold that the Industrial Assurance Commissioner was not and is not entitled to require the Society to repay to its industrial life assurance fund the sum of 61,353*l.* 13*s.* 4*d.* referred to in his written direction of March 4, 1932, or any part thereof, and that there is no obligation on the Society to comply with that direction.

No question arises as to the costs of the action, because it has been agreed between the parties without prejudice to the legal position that this action shall be treated here and elsewhere on the footing that the Attorney-General is neither to receive nor to pay costs.

Solicitors: *Field, Roscoe & Co., for A. H. Coley, Birmingham; Treasury Solicitor.*

A. R. T.

In re UNION OF LONDON AND SMITH'S BANK LIMITED'S CONVEYANCE.

MILES *v.* EASTER.

[1931. U. 546.]

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BENNETT J.
July 5, 6, 7, 8, 11, 12, 29.
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1933
Feb. 7, 9, 10, 13;
March 17.

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Restrictive Covenant—Benefit not running with the Land—Assignment by Covenantee of all adjoining Land—Enforceability of Covenant against Assign of Covenantor.

Where on a sale otherwise than under a building scheme a restrictive covenant is taken, the benefit of which is not on the sale annexed to the land retained by the covenantee so as to run with it, an assign of the covenantee's retained land cannot enforce the covenant against an assign (taking with notice) of the covenantor unless he can show (i.) that the covenant was taken for the benefit of ascertainable land of the covenantee capable of being benefited by the covenant, and (ii.) that he (the covenantee's assign) is an express assign of the benefit of the covenant.

But when the covenantee has once parted with the whole of his retained land he cannot thereafter effectually assign the benefit of the covenant.

So *held* by the Court of Appeal, affirming the decision of Bennett J.

Chambers v. *Randall* [1923] 1 Ch. 149 approved.

Ives v. *Brown* [1919] 2 Ch. 314 and *Lord Northbourne* v. *Johnston & Son* [1922] 2 Ch. 309 explained and distinguished.

Originating Summons taken out by the plaintiff, Frederick Gaston Miles, against the defendants, Stephen Easter and Alice Charlotte Jane Easter, his wife, asking (inter alia) :—

1. That it might be declared that the restrictive covenant contained in a conveyance of October 23, 1908, whereby Nathaniel George Blaker, Herbert Harry Blaker and Cecil Somers Clarke (the purchasers) covenanted for themselves their heirs and assigns not to do anything on any of the land thereby conveyed which might be or might grow to be a nuisance or damage to the Shoreham and Lancing Land Company, Ld. (the vendors) or the Union of London and Smith's Bank, Ld., and not to erect or authorize to be erected on the hereditaments thereby conveyed any factory within 460 yards of the land coloured green therein referred to and not to erect any hotel public-house beer-house or

beer-shop on the hereditaments thereby conveyed and not to authorize more than one grocer's licence for the sale of wine beer or spirits to be applied for or used within 460 yards of the said land coloured green, was not enforceable by the defendants or either of them against the plaintiff or his successors in title owner or owners of freehold property situate at Lancing aforesaid containing 147 acres or thereabouts and bounded in manner therein mentioned and which was more particularly described in a conveyance dated May 15, 1929, and made between George Hemsley of the one part and the plaintiff of the other part and delineated on a plan drawn thereon and coloured pink and purple.

2. That it might be declared that the restrictive covenant contained in a conveyance of May 11, 1909, whereby William Phillips (the purchaser) covenanted not to do anything on any of the land thereby conveyed which might be or grow to be a nuisance to Arthur Pullen Bury (the vendor) or to the neighbourhood and not to erect or authorize to be erected on any of the said land any factory hotel public-house beer-house or beer-shop and not to authorize any grocer's licence for the sale of wine beer or spirits to be applied for or used in respect of or on any part of the said land, was not enforceable by the defendants or either of them or by any other person against the plaintiff or his successors in title owner or owners of the freehold property thereinbefore described.

The summons was headed (inter alia) in the matter of the conveyances of October 23, 1908, and May 11, 1909.

The following statement of the facts is taken substantially from the considered judgment of Bennett J.: On June 24, 1907, a limited company called the Shoreham and Lancing Land Company, Ld. (hereinafter referred to as "the Shoreham Company"), acquired by purchase from Mr. Carr Lloyd a considerable area of land in the vicinity of Shoreham and Lancing, in the county of Sussex. The land so acquired was mortgaged by the Shoreham Company. In the year 1908 that company agreed to sell a part of the land they had purchased from Mr. Carr Lloyd to a Mrs. Blaker. She died

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before any conveyance had been made to her of the land she had agreed to purchase. The executors of her will were Nathaniel George Blaker, Herbert Harry Blaker and Cecil Somers Clarke.

The conveyance of October 23, 1908, being the first of the conveyances mentioned in the title to the summons, was made for the purpose of carrying out the agreement of purchase made between the Shoreham Company and Mrs. Blaker. The parties to the deed were the Union of London and Smith's Bank, Ld., the first mortgagees, referred to in the deed as "the said Bank," of the first part, the Shoreham Company, referred to in the deed as "the vendors," of the second part, Lord Lucas, a second mortgagee, of the third part, George Cecil Buller, who was an incumbrancer upon the land conveyed, of the fourth part, and Mrs. Blaker's executors, referred to in the deed as "the purchasers," of the fifth part. ✓

It appears from the recitals in this deed, and the fact is, that the land thereby conveyed was a part only of the land of the Shoreham Company. The lands conveyed by this deed had an area of 515 acres, 2 roods, 3 perches, and were delineated and described on the plan annexed thereto and thereon coloured pink, violet, brown and red. In addition to the land distinguished on this plan by these colours, there was other land which was owned and retained by the Shoreham Company and was distinguished on the plan by the colour green. ✓

The plaintiff is the owner in fee of a portion of the land coloured pink on this plan. All of his holding is on the north side of the railway line shown on the plan. He derives his title from Mrs. Blaker's executors. After October 23, 1908, the defendant Mr. Easter became the owner in fee of the greater part of the land distinguished by the green colour on the plan. He derived his title thereto from the Shoreham Company. He is still the owner of a substantial part of it, but he has sold several parts of this land, and according to the evidence there are at the present time some fourteen or fifteen persons, in addition to Mr. Easter, who are the owners

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in fee of parcels of the land distinguished by the colour green on the plan annexed to the conveyance of October 23, 1908.

It was common ground between the parties that on the same day as that upon which the Shoreham Company acquired from Mr. Carr Lloyd the lands comprised in the conveyance of October 23, 1908, they also acquired from Mr. Carr Lloyd other lands in the vicinity of Shoreham and Lancing; but there was no evidence before me as to where such other lands were situate or as to the area thereof. There was no evidence before me as to the purposes for which the Shoreham Company acquired these lands from Mr. Carr Lloyd, whether for the purpose of resale or for development as a building estate. There was no evidence of the existence of any building scheme in pursuance of which the Shoreham Company intended to develop the land they had acquired from Mr. Carr Lloyd or any part thereof; and I am really left to guess at the reasons (if any) which led to the introduction in the conveyance of October 23, 1908, of the purchasers' covenant. ✓

It appears from the recitals to an indenture of January 19, 1912, made between the Shoreham Company of the first part, Richard Bragg of the second part, and the Seaside Land Company of the third part, that between June 24, 1907, and January 19, 1912, the Shoreham Company had from time to time sold portions of the land they had acquired from Mr. Carr Lloyd contemporaneously with the land comprised in the conveyance of October 23, 1908, and that the Shoreham Company were then in voluntary liquidation, Richard Bragg being their liquidator. In these circumstances, by the indenture of January 19, 1912, the Shoreham Company conveyed to the Seaside Land Company all the unsold portions of the land the Shoreham Company had bought from Mr. Carr Lloyd on June 24, 1907.

By an indenture dated October 19, 1920, and made between the Shoreham Company of the first part, Alexander Smith, who was then their liquidator, of the second part, the Seaside Land Company of the third part, the defendant Stephen Easter of the fourth part, and the defendant Alice Charlotte

Jane Easter, wife of the said Stephen Easter, of the fifth part, after reciting five indentures of June 24, 1907, whereby certain hereditaments which were referred to as the Shoreham Estate had been assured to the Shoreham Company in fee simple, and reciting that the Shoreham Company had sold certain hereditaments in land, part of the Shoreham Estate, and on completion of the said sale had assured the said lands and hereditaments to the respective purchasers thereof, subject to certain covenants restrictive of building upon and user of the said lands and hereditaments or otherwise contained in the assurances of the said respective purchasers thereof, and reciting a special resolution of the voluntary liquidation of the Shoreham Company, and reciting the indenture of January 19, 1912, between the Shoreham Company, Bragg, and the Seaside Company, whereby the lands and hereditaments thereby described, part of the then unsold portions of the Shoreham Estate, had been assured to the use of the Seaside Company in fee simple, and reciting that the Seaside Company from time to time sold divers further lands and hereditaments, part of the Shoreham Estate, and on completion of the said several sales had assured the same lands and hereditaments to the respective purchasers thereof, subject to certain covenants restrictive of building upon or of user of the same lands and hereditaments contained in the assurances of the said respective purchasers thereof, and reciting that certain portions of the Shoreham Estate had not been sold by the Seaside Company and that the Seaside Company was still in possession thereof, it was witnessed that in consideration of the sum of one guinea to Smith, as liquidator of the Shoreham Company, and of one guinea to the Seaside Company paid by the defendant Stephen Easter, the Shoreham Company and the Seaside Company respectively, according to their respective estates and interest as beneficial owners and if and so far as they respectively lawfully could or might thereby respectively grant unto the defendant Stephen Easter of the benefit in common with the Seaside Company and other persons (if any) entitled thereto, the covenants restrictive of building upon

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and user of the several parts already sold of the Shoreham Estate contained in the respective assurances to the respective purchasers thereof, to hold the same unto the said Stephen Easter, his heirs and assigns.

By an indenture dated October 15, 1921, made between the Shoreham Company of the first part, its liquidator of the second part, the Seaside Company of the third part, a company called the South Coast Construction Company, Ld., of the fourth part, the defendant Stephen Easter of the fifth part, Mrs. Easter of the sixth part, and Mrs. Dorothy Vera Hamilton of the seventh part, an assignment was made by the Shoreham Company, the Seaside Company and the Construction Company, to the defendant Stephen Easter of all the benefit of the covenants restrictive of building upon or user of the several parts already sold of the Shoreham Estate lying to the west of the entrance to Shoreham Harbour contained in the respective assurances to the respective purchasers thereof, with certain exceptions which are not material.

The facts relating to the second question raised by the summons were as follows:—

By an indenture of May 10, 1909, Mrs. Blaker's executors conveyed part of the land which had been conveyed to them on October 23, 1908, to a Mr. Pullen Bury. Mr. Pullen Bury proceeded at once to divide up into parcels what he had purchased from Mrs. Blaker's executors and to convey those parcels to a number of different purchasers, and on May 11, 1909, he conveyed one of those parcels to Mr. Phillips. The parcel conveyed to Phillips included the land now owned by the plaintiff. Phillips entered into a restrictive covenant with Mr. Pullen Bury, and the plaintiff at the time of his purchase had notice of this restrictive covenant. The covenant is in these terms: "The purchaser for himself his heirs and assigns owner or owners for the time being of the hereditaments hereby conveyed but not so as to make the purchaser or any person claiming under him personally liable after he or they shall have parted with the said hereditaments hereby covenants with the vendor his heirs and assigns not to do anything on any of the land hereby conveyed which may be or grow to be a nuisance or damage to the vendor or to the neighbourhood and not to erect or authorise to be erected on any of the said land any factory hotel public house beer house or beer shop and not to authorise any grocer's licence for the sale of wine beer or spirits to be applied for or used in respect of or on any part of the said land."

On April 10, 1931, Mr. Arthur Pullen Bury entered into a deed with the defendants whereby, in consideration of the sum of 40*l.* paid to Mr. Pullen Bury by the defendants, Mr. Pullen Bury, as beneficial owner, if and so far as he lawfully could or might, thereby granted the benefit in common with other persons (if any) entitled thereto of the covenants restrictive of building upon or user of parts of the premises originally conveyed to Mr. Pullen Bury which had been sold contained in the respective assurances of the respective purchasers thereof, except the covenants intended to be thereby released. At the date of this deed Mr. Pullen Bury had sold all the land conveyed to him by Mrs. Blaker's executors on May 10, 1909, and the defendants were the owners in fee of a considerable part of the lands comprised in that conveyance.

Cleveland-Stevens K.C. and *Raymond Jennings* for the plaintiff. The sole legal question is whether in the circumstances certain covenants, the benefit of which had been assigned to the defendants, are enforceable against the plaintiff. These covenants are not covenants the benefit of which could or did run with the land. If the benefit of these covenants passed it passed by the assignments. The only persons benefited by the assignments are Mr. and Mrs. Easter.

[They referred to *Renals* v. *Cowlishaw* (1); *Brigg* v. *Thornton* (2); *Rogers* v. *Hosegood* (3); and *Dyson* v. *Forster*. (4)]

On the authority of *Renals* v. *Cowlishaw* (1) and *Rogers* v. *Hosegood* (3) it is submitted that it is impossible to contend that the benefit of these covenants was so effectually annexed by some one that on the conveyance of part of the lands, without more, the benefit passed to purchasers under those conveyances.

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(1) (1878) 9 Ch. D. 125; (1879) 11 Ch. D. 866.

(2) [1904] 1 Ch. 386, 395.

(3) [1900] 2 Ch. 388, 397.

(4) [1909] A. C. 98, 102.

The next point is the question whether the assignments in 1920, 1921 and 1931 were effective to pass to Mr. and Mrs. Easter, or both, the benefit of the covenants in the conveyances of 1908 and 1909. If the benefit of the covenants was so annexed that without any express assignment the benefit would pass to the defendants, that would be an end of the case. The benefit of the covenants not being such as to pass automatically on a conveyance without express assignment, a benefit of this kind could have passed only if it had been assigned by the Shoreham Company and Mr. Pullen Bury respectively, while they respectively retained the land for the benefit of which it is assumed that the covenants were taken.

[They referred to Williams on Vendor and Purchaser, 3rd ed., vol. i., p. 467; Jolly on Restrictive Covenants, 2nd ed., p. 47, para. 2; and to *Ives* v. *Brown* (1); *Lord Northbourne* v. *Johnston & Son* (2); *Chambers* v. *Randall* (3); *Formby* v. *Barker* (4); *London County Council* v. *Allen* (5); and *Long Eaton Recreation Grounds Co.* v. *Midland Ry.* (6)]

Topham K.C. and *F. Baden Fuller* for the defendants. When the question whether the benefit of a covenant runs in equity is being considered, it is purely an equitable consideration as soon as the original covenantors cease to be involved.

In the case of a covenant with a man who no longer has any land capable of being benefited by that covenant, he cannot sue an assign because there is an equitable remedy against that assign. If an assign of a covenant chooses to sue, having no land capable of being benefited, he will get no help from the Court of Chancery. In every deed of the plaintiff's title he and his successors take the land subject to the deed of October 23, 1908, or later to the deed of 1909.

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(1) [1919] 2 Ch. 314.
(2) [1922] 2 Ch. 309.
(3) [1923] 1 Ch. 149.
(4) [1903] 2 Ch. 539.
(5) [1914] 3 K. B. 642.
(6) [1902] 2 K. B. 574.

It is not necessary that the deed should expressly say that the covenant is for the benefit of any particular land in order to annex the covenant: see *Western* v. *MacDermot.* (1) In a covenant with X. and his assigns the word "assigns" means "assigns of the land" if it can be found out from the deed as a whole to what land reference is made: see *Renals* v. *Cowlishaw.* (2) Here "assigns" means "assigns of the land coloured green."

[They referred to *Rogers* v. *Hosegood* (3); *In re Sunnyfield* (4); *Ives* v. *Brown* (5); and *Everett* v. *Remington.* (6)]

The mere fact that the covenant has for some years been separate is not enough to prevent an assignee from suing after he obtains the covenant, provided that the Court regards him, in equity, as a person covered by the word "assign." An assignee of the covenant cannot sue an assignee of the burdened land, unless he is an assignee of some land for the benefit of which the covenant was intended to be assigned. Severance does not prevent a covenant from being assignable by a subsequent deed.

[They referred to *Chambers* v. *Randall* (7) and *Lawrence* v. *Cassel.* (8)]

Cleveland-Stevens K.C. in reply. As soon as the Shoreham Company in 1912 had parted with the whole of the green land the covenant became a covenant in gross and was no longer capable of assignment. When a person gets rid of all his land he puts it out of his power to sue on the covenants afterwards. There appears to be no case in which it has been held that a covenant of this kind can be assigned.

[He referred to *Kelsey* v. *Dodd.* (9)]

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1932. July 29. BENNETT J. read the following judgment: The first question raised by this summons is whether certain covenants contained in a conveyance dated October 23, 1908, being the first of the conveyances mentioned in the title to the summons, are capable of being enforced by the defendants or either of them against the plaintiff. The covenants are covenants restricting the user of the land thereby conveyed. The plaintiff is now the owner in fee of a part of the land thereby conveyed. At the time the plaintiff acquired the land he now owns, he had notice of the restrictive covenants. It has been conceded on the defendants' behalf that the burden of these restrictive covenants runs with the land he now owns.

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(1) (1866) L. R. 1 Eq. 499, 506.
(2) 9 Ch. D. 125.
(3) [1900] 2 Ch. 388.
(4) [1932] 1 Ch. 79, 85.
(5) [1919] 2 Ch. 314.
(6) [1892] 3 Ch. 148.
(7) [1923] 1 Ch. 149.
(8) [1930] 2 K. B. 83.
(9) (1881) 52 L. J. (Ch.) 34.

The second question raised by the summons raises similar points regarding restrictive covenants imposed upon the same land by a conveyance of May 11, 1909, being the second of the conveyances mentioned in the title to the summons. Apart from the question of costs, these are the only two questions to be decided on the summons, which has been amended by deleting all reference to the Law of Property Act, 1925, raising the questions as questions of construction affecting the plaintiff and the defendants only, the question of construction arising out of the language of the two conveyances and of their effect in the events which have happened, the parties being agreed as to the facts.

The history of the matter begins in the month of June, 1907. [His Lordship then stated the facts as above set out down to the point at which he stated that Easter and some fourteen or fifteen other persons at the date of the summons were the owners of the land coloured green, and continued:] It was admitted at the hearing by Mr. Topham, on behalf of the defendants, that all the plaintiff's land is more than 460 yards away from the land coloured green on the plan. It is clear that if it be intended to annex to a parcel of land the benefit of a covenant restricting the user of another parcel of land, the deed entered into to give effect to this intention must define the parcel of land to which the benefit of the covenant is to be annexed: see *Renals* v. *Cowlishaw.* (1) In my judgment, the deed ought also to make it plain that it is intended to annex the benefit of the covenant to the defined parcel.

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(1) 11 Ch. D. 866, 868.

The law relating to covenants restricting the user of land entered into by persons who do not stand towards one another in the relationship of landlord and tenant is of modern origin. It is, I think, still in course of development. The annexation to one parcel of land of the benefit of a covenant restricting the user of another parcel creates a relationship between the two parcels analogous to that of dominant and servient tenement, and if the parties intended to do this, they ought, in my judgment, to do it in such a manner and by the use of such language as to leave no room for doubt as to whether or not it has been done.

I now proceed to consider the meaning and effect of the covenants contained in the conveyance of October 23, 1908. The deed contains a declaration in these terms: "The expression 'the vendors' as hereinbefore used shall where the context admits include besides the Shoreham and Lancing Land Company Limited their successors and assigns and the expression 'the purchasers' as hereinbefore used shall where the context admits include besides the said Nathaniel George Blaker Herbert Harry Blaker and Cecil Somers Clarke their heirs executors administrators and assigns."

The deed contains certain covenants entered into by the vendors as well as covenants entered into by the purchasers. The first of the vendors' covenants so far as material is as follows: "The vendors for themselves and their successors in title and assigns do hereby (with the consent of the Bank Lord Lucas and George Cecil Buller as such mortgagees or incumbrancers as aforesaid) covenant with the purchasers their heirs and assigns or other the person or persons who shall for the time being be the owner or owners of the lands hereby conveyed or any part or parts thereof (all of whom are included under the expression 'the owner of the land coloured pink' as hereinafter used)" to do certain things upon the land.

It is, I think, clear that, although the vendors are made to covenant for themselves and their successors in title and assigns, the only persons who could have enforced this covenant were the Shoreham Company, because in the first place the covenant is an affirmative covenant, that is to say, a covenant to do certain things, and in the second place, there is nothing to indicate an intention to burden the owner for the time being of any particular land with the obligation of performing the covenant. It also is, I think, clear that by making the vendors covenant not merely with the purchasers but also with their heirs or assigns or other the person or persons who shall for the time being be the owners of the land thereby conveyed or any part or parts thereof, the draftsman was minded to make the benefit of the covenant run with the land. It is not necessary to consider or to determine whether he was successful.

The next covenant by the vendors throws further light on the draftsman's intention. It is in these terms: "The vendors for themselves their successors and assigns as owners of the land coloured green on the plan hereto do hereby (with the consent of the said Bank Lord Lucas and George Cecil Buller as such mortgagees or incumbrancers as aforesaid) further covenant with the purchasers their heirs and assigns or other the owners or owner for the time being of the land coloured pink or any part or parts thereof not to do or permit or suffer to be done anything upon the said land coloured green on the said plan hereto or any part thereof which would interrupt or interfere with the natural course of the stream or watercourse running from the south-west corner of the said land coloured pink into the west portion of the said land coloured green and to keep the said stream or watercourse at the western end of the said land coloured green clear of all weeds and other obstructions and not to throw or permit or suffer to be thrown therein any spoil rubbish or refuse whatsoever and not to throw or permit or suffer to be thrown into the said stream or watercourse on the said land coloured green (while the said stream or watercourse at the south-west side of the said land coloured pink shall flow into the said land coloured green) any spoil rubbish or refuse whatsoever which may contaminate the quality of the water therein and not to do or so far as possible permit to be done anything upon the said land coloured green which may be or which may grow to be a nuisance or damage to the owner of the said land coloured pink or any part thereof and not to erect or permit to be erected on the said land coloured green any factory."

The phrase, "the vendors for themselves their successors and assigns as owners of the land coloured green," indicates, in my judgment, the intention to throw the burden of the negative and restrictive covenant which follows upon and to annex it to the green land, whilst the fact that the covenant is given to "the purchasers their heirs and assigns or other the owners or owner for the time being of the land coloured pink or any part or parts thereof" is, in my judgment, a clear indication of the intention to annex the benefit of the covenant to each and every part of the pink land. Therefore the draftsman has shown that when he desires to annex the benefit and burden respectively of restrictive covenants to different parcels of land he knows the appropriate language to use in order to do so.

I now come to the covenant which gives rise to the first question on the summons, and it is in the following terms: "The purchasers so as to bind their trust estate but not their own personal or private estates for themselves their heirs and assigns do hereby covenant with the vendors their successors and assigns and also as a separate covenant with the said Bank their successors and assigns (but not so as to make the purchasers or any person claiming under them personally liable after parting with the land in respect of which any breach of this covenant shall subsequently be committed) not to do anything on any of the lands hereby conveyed which may be or may grow to be a nuisance or damage to the vendors or to the said Bank and not to erect or authorise to be erected on the hereditaments hereby conveyed any factory within 460 yards of the said land coloured green and not to erect any hotel public-house beer-house or beer-shop on the hereditaments hereby conveyed and not to authorise more than one grocer's licence for the sale of wine beer or spirits to be applied for or used within 460 yards of the said land coloured green."

In view of the fact that no part of the plaintiff's holding is within 460 yards of the land coloured green, the only covenants with which I am concerned are, first, the covenant not to erect any hotel, public-house, beer-house or beer-shop on the hereditaments thereby conveyed; and secondly, not to do anything on any of the lands thereby conveyed which might be or might grow to be a nuisance or damage to the vendors or to the Bank.

The first contention on behalf of the defendants was that the benefit of these covenants was annexed to the land coloured green on the plan so as to run therewith without express assignment. In my judgment this contention cannot prevail. One must have regard to the language employed in the deed, and there is a striking contrast between the language employed in the preceding covenant given by the vendors and the language employed in the purchasers' covenant now under consideration. In the case of the covenant given to the purchasers by the vendors it was given to them, their heirs and assigns or other the owner or owners for the time being of the land coloured pink or any part or parts thereof—words which seem to me to show exactly the intention of annexing the benefit of the covenant to every part of the land so coloured. The covenant now under consideration is given to the vendors, their successors and assigns, and also as a separate covenant to the Bank, their successors and assigns. It is not given to the owner or owners for the time being of the land coloured green or any part thereof. It would not be right to conclude that the omission of any reference to the green land was accidental or due to careless drafting, and yet a reference to it is, in my judgment, necessary if the defendants' construction is to prevail. I cannot imply a reference to it, and therefore there is, in my judgment, no basis for the defendants' contention, and on a proper construction of the covenant no annexation of the benefit of it to any defined land of the vendors.

This conclusion makes it necessary for me to determine whether the purchasers' covenant can be enforced by an express assignee of the benefit thereof against an assignee of a part of the lands to which the burden of such covenants was annexed. [His Lordship then resumed the statement of the facts as above set out, and stated further facts down to the statement of the effect of the deed of assignment by the Shoreham Company to Mr. Easter, dated October 15, 1921, and continued :] Upon the footing that the benefit of the purchasers' covenants contained in the conveyance of October 23, 1908, was not annexed to the land coloured green thereon, so as to run therewith without express assignment, the defendant Stephen Easter claims to be entitled to enforce those covenants against the plaintiff by virtue of the express assignment contained in those deeds.

In my judgment, in order that an express assignee of a covenant restricting the user of land may be able to enforce that covenant against the owner of the land burdened with the covenant, he must be able to satisfy the Court of two things. The first is that it was a covenant entered into for the benefit or protection of land owned by the covenantee at the date of the covenant. Otherwise it is a covenant in gross, and unenforceable except as between the parties to the covenant: see *Formby* v. *Barker*. (1) Secondly, the assignee must be able to satisfy the Court that the deed containing the covenant defines or contains something to define the property for the benefit of which the covenant was entered into: see James L.J. in *Renals* v. *Cowlishaw*. (2)

I will assume in favour of the defendants that the purchasers' covenants were entered into for the benefit or protection of land owned by the Shoreham Company on October 23, 1908. I can find nothing in the deed to define the property for the benefit of which the covenants were entered into.

In my judgment, therefore, the answer to the first question is that the defendants cannot, nor can either of them, enforce against the plaintiff the purchasers' covenant contained in the conveyance of October 23, 1908.

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(1) [1903] 2 Ch. 539, 554.

(2) 11 Ch. D. 866, 868.

I now turn to the second question raised by the summons, which asks: "That it may be declared that the restrictive covenant contained in the above mentioned conveyance of May 11, 1909, whereby the said William Phillips (the purchaser) covenanted not to do anything on any of the land thereby conveyed which might be or grow to be a nuisance or damage to the said Arthur Pullen Bury (the vendor) or to the neighbourhood and not to erect or authorize to be erected on any of the said land any factory hotel public-house beer-house or beer-shop and not to authorize any grocer's licence for the sale of wine beer or spirits to be applied for or used in respect of or on any part of the said land is not enforceable by the defendants or either of them or by any other person against the plaintiff or his successors in title owner or owners of the freehold property hereinbefore described." [His Lordship then stated the facts relating to the second question raised by the summons as above set out, and continued:] The defendants argued, first, that the benefit of the covenants entered into by Phillips as purchaser with Pullen Bury as vendor in the conveyance of May 11, 1909, was annexed to some land of Pullen Bury's acquired by him from Mrs. Blaker's executors and retained by him at the time of the conveyance to Phillips, and that the defendants, as owners of the land or part thereof to which the benefit of Phillips' covenants was annexed, could enforce them against the plaintiff.

In my judgment this argument fails, for the reason (*a*) that the conveyance makes no attempt to annex the benefit of the covenant to any land retained by Pullen Bury, and (*b*) contains no definition of any land to which the benefit of the covenant was annexed.

The second argument was based on the express assignment of the benefit of the covenants contained in the deed of April 10, 1931. But this argument also fails, in my judgment, because of the absence in the conveyance of May 11, 1909, of any definition of the land for the benefit of which the covenant was given.

On those grounds, therefore, the plaintiff is, in my judgment, entitled to the two declarations for which he asks on the originating summons.

J. L. D.

The defendants appealed. The appeal was heard on February 7, 9, 10 and 13, 1933.

Topham K.C. and *F. Baden Fuller* for the appellants.

Cleveland-Stevens K.C. and *Raymond Jennings* for the respondent.

The arguments on the appeal were substantially the same as those used in the Court below. In addition to the cases there cited, *Reid* v. *Bickerstaff* (1) and *Lord Strathcona Steamship Co.* v. *Dominion Coal Co.* (2) were referred to.

Cur. adv. vult.

1933. March 17. The judgment of the Court (LORD HANWORTH M.R., LAWRENCE and ROMER L.JJ.) was read by

ROMER L.J. This is an appeal by the defendants from an order made by Bennett J. on July 29, 1932, whereby it was declared that certain restrictive covenants affecting lands of the plaintiff at Shoreham and Lancing in the county of Sussex, and contained in two indentures dated respectively October 23, 1908, and May 11, 1909, are not enforceable by the defendants or either of them against the plaintiff.

The relevant facts, as to which there is no dispute, are fully stated in the judgment of the learned judge and need not be repeated here. The questions arising on the appeal depend upon the application to those facts of the law relating to restrictive covenants affecting land. That the plaintiff is bound by the covenants in question is not disputed, in view of the fact that he purchased his lands with notice of them. What is in dispute is the question whether the defendants are entitled to the benefit of such covenants. Now the defendants are not the original covenantees, and it therefore becomes necessary to ascertain what person other

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(1) [1909] 2 Ch. 305.

(2) [1926] A. C. 108.

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than the original covenantee is entitled to the benefit of a restrictive covenant affecting land. This question was put to himself by Hall V.-C. in *Renals* v. *Cowlishaw* (1), and the answer was given in a judgment so well known that it is unnecessary to refer to it at length. It is a judgment that has received the approval both of this Court and of the House of Lords, and has always been regarded as a correct statement of the law upon the subject. Stated shortly it laid down this: that, apart from what are usually referred to as building scheme cases (and this is not a case of that sort), a purchaser from the original covenantee of land retained by him when he executed the conveyance containing the covenant will be entitled to the benefit of the covenant if the conveyance shows that the covenant was intended to enure for the benefit of that particular land. It follows that, if what is being acquired by the purchaser was only part of the land shown by the conveyance as being intended to be benefited, it must also be shown that the benefit was intended to enure to each portion of that land. In such cases the benefit of the restrictive covenant will pass to the purchaser without being mentioned. It runs with the land. In all other cases the purchaser will not acquire the benefit of the covenant unless that benefit be expressly assigned to him—or, to use the words of the Vice-Chancellor (2), "it must appear that the benefit of the covenant was part of the subject-matter of the purchase."

In *Renals* v. *Cowlishaw* (1) the covenant was entered into with the covenantee, his heirs and assigns, and it appears to have been argued that the use of the word assigns showed an intention that the benefit of the covenant should run with the land. But, to use the language of Farwell J. in *Rogers* v. *Hosegood* (3), "there was nothing to shew what assigns were intended by the words of the covenant; there was no necessary implication that each assign of each parcel of the vendor's land, whether acquired before or after the date of the deed, was to have the benefit of the covenant;

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(1) 9 Ch. D. 125.
(2) 9 Ch. D. 125, 130.
(3) [1900] 2 Ch. 388, 396.

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the inference, indeed, was to the contrary, and the Courts accordingly held that the covenant did not run, but must be expressly assigned in order to pass. Contrast this with the case of the ordinary covenants for title: these undoubtedly run with the land, and each purchaser of each portion of the land gets the benefit of the covenants so far as they relate to the land purchased by him. In both these cases the covenants are entered into with the heirs and assigns, but in the first case the word 'assign,' on the true construction of the deed, means 'assign of the covenant,' in the latter 'assign of the land, to which is annexed the benefit of the covenant by virtue of the evidence of intention so to contract which is found in the deed and the surrounding circumstances.'" In *Rogers* v. *Hosegood* (1) itself the benefit of the covenant was held to run with the land of the covenantees, for the covenant had been entered into with them, their heirs and assigns, with the express intent that the covenant would enure to the benefit of the covenantees, their heirs and assigns and others claiming under them to all or any of their lands adjoining or near to the premises then being conveyed to the covenantor. In *Renals* v. *Cowlishaw* (2) the benefit of the covenant had never been expressly assigned by the covenantee. In neither of these cases, therefore, did it become necessary for the Court to inquire into the circumstances in which an express assignee of the benefit of a covenant that does not run with the land is entitled to enforce it. In the present case, however, it is necessary to do so, inasmuch as the defendants claim to be the express assignees of the benefit of the restrictive covenants contained in the deeds of October 23, 1908, and May 11, 1909.

Does [illegible]
[illegible]

Now it may be conceded that the benefit of a covenant entered into with the covenantee or his assigns is assignable. The use of the word "assigns" indicates this: see Williams on Personal Property, 18th ed., p. 33. But it by no means follows that the assignee of a restrictive covenant affecting land of the covenantor is entitled to enforce it against an assign of that land. For the burden of the covenant did not run with the land at law, and is only enforceable against a purchaser with notice by reason of the equitable doctrine that is usually referred to as the rule in *Tulk* v. *Moxhay.* (1) It was open, therefore, to the Courts of Equity to prescribe the particular class of assignees of the covenant to whom they should concede the benefit of the rule. This they have done, and in doing so have included within the class persons to whom the benefit of the covenant could not have been assigned at law. For at law the benefit could not be assigned in pieces. It would have to be assigned as a whole or not at all. And yet in equity the right to enforce the covenant can in certain circumstances be assigned by the covenantee from time to time to one person after another. Who then are the assignees of the covenant that are entitled to enforce it ? The answer to this question is to be found in several authorities which it now becomes necessary to consider.

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(1) [1900] 2 Ch. 388.

(2) 9 Ch. D. 125.

In *Formby* v. *Barker* (2) a vendor, on the occasion of the sale of the whole of his land, exacted from the purchaser a restrictive covenant as to its user. The vendor having died, his executor sought to enforce the covenant against an assignee of the purchaser. Inasmuch as there was no land retained by the vendor on the occasion of the sale the covenant was merely personal to the vendor, and was accordingly held to be unenforceable by the vendor's executor as his assignee against the assignee of the purchaser. " If restrictive covenants," said Romer L.J. (3), " are entered into with a covenantee, not in respect of or concerning any ascertainable property belonging to him, or in which he is interested, then the covenant must be regarded, so far as he is concerned, as a personal covenant—that is, as one obtained by him for some personal purpose or object. It appears to me that it is not legally permissible for him to assign the benefit of such a covenant to any person or persons he may choose, so as to place the assign or assigns in his position." To a like effect was the decision in *London County Council* v. *Allen.* (4) In that case the covenantees had never had any interest at all in the land in respect of which the owner had entered into a restrictive covenant. It was held that the covenantees were not entitled to enforce the covenant against an assignee of the covenantor. Buckley L.J. said (1) that "the doctrine in *Tulk* v. *Moxhay* (2) does not extend to the case in which the covenantee has no land capable of enjoying, as against the land of the covenantor, the benefit of the restrictive covenant." Scrutton J. said (3): "If the covenant does not run with the land in law, its benefit can only be asserted against an assign of the land burdened, if the covenant was made for the benefit of certain land, all or some of which remains in the possession of the covenantee or his assign, suing to enforce the covenant."

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(1) (1848) 2 Ph. 774.
(2) [1903] 2 Ch. 539.
(3) [1903] 2 Ch. 539, 554.
(4) [1914] 3 K. B. 642.

It is plain, however, from these and other cases, and notably that of *Renals* v. *Cowlishaw* (4), that if the restrictive covenant be taken not merely for some personal purpose or object of the vendor, but for the benefit of some other land of his in the sense that it would enable him to dispose of that land to greater advantage, the covenant, though not annexed to such land so as to run with any part of it, may be enforced against an assignee of the covenantor taking with notice, both by the covenantee and by persons to whom the benefit of such covenant has been assigned, subject however to certain conditions. In the first place, the "other land" must be land that is capable of being benefited by the covenant—otherwise it would be impossible to infer that the object of the covenant was to enable the vendor to dispose of his land to greater advantage. In the next place, this land must be "ascertainable" or "certain," to use the words of Romer and Scrutton L.JJ. respectively. For, although the Court will readily infer the intention to benefit the other land of the vendor where the existence and situation of such land are indicated in the conveyance or have been otherwise shown with reasonable certainty, it is impossible to do so from vague references in the conveyance or in other documents laid before the Court as to the existence of other lands of the

(1) [1914] 3 K. B. 660.
(2) 2 Ph. 774.
(3) [1914] 3 K. B. 642, 672.
(4) 9 Ch. D. 125.

vendor, the extent and situation of which are undefined. In the third place, the covenant cannot be enforced by the covenantee against an assign of the purchaser after the covenantee has parted with the whole of his land.

This last point was decided, and in our opinion rightly decided, by Sargant J. in *Chambers* v. *Randall.* (1) As pointed out by that learned judge, the covenant having been entered into to enable the covenantee to dispose of his property to advantage, that result will in fact have been obtained when all that property has been disposed of. There is therefore no longer any reason why the Court should extend to him the benefit of the equitable doctrine of *Tulk* v. *Moxhay.* (2) That is only done when it is sought to enforce the covenant in connection with the enjoyment of land that the covenant was intended to protect. But it was also held by Sargant J. in the same case (1), and in our opinion rightly held, that although on a sale of the whole or part of the property intended to be protected by the covenant the right to enforce the covenant may be expressly assigned to the purchaser, such an assignment will be ineffective if made at a later date when the covenantee has parted with the whole of his land. The covenantee must, indeed, be at liberty to include in any sale of the retained property the right to enforce the covenants. He might not otherwise be able to dispose of such property to the best advantage, and the intention with which he obtained the covenant would be defeated. But if he has been able to sell any particular part of his property without assigning to the purchaser the benefit of the covenant, there seems no reason why he should at a later date and as an independent transaction be at liberty to confer upon the purchaser such benefit. To hold that he could do so would be to treat the covenant as having been obtained, not only for the purpose of enabling the covenantee to dispose of his land to the best advantage, but also for the purpose of enabling him to dispose of the benefit of the covenant to the best advantage. Where, at the date of the assignment of the benefit of the covenant, the covenantee has disposed of the whole of his land, there is an additional reason why the assignee should be unable to enforce it. For at the date of the assignment the covenant had ceased to be enforceable at the instance of the covenantee himself, and he cannot confer any greater rights upon the assignee than he possessed himself. In opposition to this view we were very properly pressed by counsel with two earlier decisions of Sargant J.

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(1) [1923] 1 Ch. 149.

(2) 2 Ph. 774.

The earlier of these is *Ives* v. *Brown*. (1) In that case the survivor of two joint covenantees was the owner of other land held by herself as trustee for herself for life with remainder to her testamentary appointees. By her will she appointed the lands to the plaintiff Ives for life, but not in such a way as to pass to him the benefit of the restrictive covenant which accordingly devolved upon her death upon her two executors, of whom the plaintiff Ives was one. In an action brought by Ives alone to enforce the covenant against an assignee of the covenantor, it was objected that he was not entitled to maintain the action. The learned judge thereupon gave leave to the plaintiff to amend by adding as a co-plaintiff the other executor, and eventually granted an injunction to restrain a breach of the covenant. After holding that the testamentary appointment did not amount to an assignment of the benefit of the restrictive covenant, he added (2): "and it was, therefore, necessary in my judgment that her legal personal representatives should be joined in the action." The learned judge does not, however, appear to have addressed his mind to the question whether the legal personal representatives of a covenantee can enforce a restrictive covenant unless they are possessed of land that the covenant was intended to protect, and that question does not appear to have been argued. But it may well have been that the executors still had the legal estate of the land vested in them, and if that were so, then they could not be said to have had no interest in the land.

The second case was that of *Lord Northbourne* v. *Johnston & Son*. (3) But the assignment of the benefit of the

(1) [1919] 2 Ch. 314. (2) Ibid. 324. (3) [1922] 2 Ch. 309.

covenant in that case was made by a representative of the covenantees who, at the time of the assignment, held such benefit as a bare trustee for the plaintiff, to whom had been conveyed at an earlier date the land for the protection of which the covenant had originally been obtained. It is true that after the conveyance the covenantees were not possessed of any of that land, but they continued to hold the benefit of the covenant as trustees for the plaintiff, and the right to enforce it was treated accordingly as being kept alive for his benefit. In neither of these two cases did the learned judge intend to decide, nor did he in fact decide, that a covenantee who has parted with all the land for the protection of which the covenant was imposed can thereafter confer upon an assignee of the covenant the right to enforce it. Indeed, in *Chambers* v. *Randall* (1), as already stated, it was definitely decided by the learned judge that he could not.

Such being the law, it only remains to apply it to the facts of the present case; and the first question that has to be considered is whether or no an intention is shown in the deed of October 23, 1908, that the restrictive covenants should enure for the benefit of any particular land of the covenantees. As to this, it is contended on behalf of the appellants that an intention is shown in the deed to attach the benefit to the land coloured green upon the plan annexed to it. It is conceded by them that if they are wrong in this contention there is no other land of the vendors for the benefit of which the covenants can be said to enure. Now for the purpose of considering this question there is one outstanding fact to be borne in mind, a fact that naturally had considerable effect upon the mind of Bennett J. It is this. In the indenture are contained certain restrictive covenants on the part of the vendors as to the user of the land coloured green, and those covenants are expressed to be made with the "purchasers their heirs and assigns or other the owner or owners for the time being of the land coloured pink or any part or parts thereof." These are apt words to ensure that the benefit of the covenant should run with the pink land and every part of it, and one cannot doubt that in framing them the author had *Renals* v. *Cowlishaw* (1) and *Rogers* v. *Hosegood* (2) in mind. To use the words of Bennett J., "the draftsman has shown that when he desires to annex the benefit and burden respectively of restrictive covenants to different parcels of land he knows the appropriate language to use in order to do so." No such language is, however, used in relation to the restrictive covenants entered into by the purchasers. If the omission were due to design it would be conclusive of the matter. It would, however, be possible to attribute the omission to carelessness, if one could find elsewhere in the deed a strong indication of intention to make the benefit of the purchasers' covenant enure to the green land. The appellants contend that this strong indication is afforded by the fact that the restrictive covenants entered into by the vendors in relation to the green land and those entered into by the purchasers in relation to the pink land are more or less reciprocal covenants, and that just as the vendors' covenants were entered into for the benefit of the pink lands, so too were the purchasers' covenants entered into for the benefit of the green lands. But an examination of the two sets of covenants renders this argument untenable. For though the vendors covenant not to do anything upon the green land that may be a nuisance or damage to the owner of the land coloured pink or any part thereof, the corresponding covenant on the part of the purchasers is not to do anything on the land coloured pink that might be a nuisance or damage to the vendor or to the Bank (who were the mortgagees), no mention being made of the green land or any other land of the vendors or the Bank. It is hardly permissible to regard this further omission as being unintentional. There must be some limit to the carelessness to be attributed to the draftsman. But the appellants also rely upon the fact that the purchasers covenant not to erect any factory upon the lands coloured pink within 460 yards of the land coloured green, and not to authorize more than

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(1) [1923] 1 Ch. 149.

(1) 9 Ch. D. 125.

(2) [1900] 2 Ch. 388.

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one grocer's licence for the sale of wine, beer or spirits to be applied for or used within the same distance. This circumstance does, no doubt, give some ground for the suggestion that these two restrictions were intended for the benefit of the green land as distinct from any other lands of the vendors and that, therefore, the restrictions as a whole should be so regarded. But these two references to the green land do no more than define the part of the pink land that was to be subject to the two restrictions in question, and such restrictions may quite conceivably have been intended also to protect the land coloured yellow on the plan, land that, as is shown by the conveyance itself, was also land of the vendors, and land of which part at any rate was, as appears from the plan, capable of being benefited by such restrictions. In these circumstances it is impossible, having regard to the remarkable difference between the wording of the covenants by the vendors and purchasers respectively, to avoid drawing the inference that it was not intended to annex the benefit of the purchasers' covenant to the land coloured green. That is the inference that Bennett J. drew, and in our opinion he was right in so doing. The benefit of such covenant did not, therefore, run with the green land, and the next question is whether the defendant Easter is entitled to enforce the covenant as express assignee of the benefit of it. In our opinion he is not. To start with, it is impossible to ascertain with any certainty what lands retained by the covenantees when the conveyance of October 23, 1908, was executed were intended to be protected by the covenant so that the covenantees might thereafter dispose of them to greater advantage. That conveyance shows that the vendors were possessed of other land in the vicinity, reference being made in the deed to "foreshore belonging to the vendors west of the harbour entrance," without further defining it, and to land coloured yellow on the plan attached to the deed in terms that clearly indicate their ownership of such land. But our attention is also called to certain transactions between the covenantees and a company called The Service Land Company, Ld., in the month of January, 1912, that show that in October, 1908, the covenantees were possessed of still other lands at Lancing and Shoreham of considerable, though, so far as the Court is concerned, of undefined extent. Referring to these other lands, Bennett J. said : " There was no evidence before me as to where such other lands were situate or as to the area thereof. There was no evidence before me as to the purposes for which the Shoreham Company acquired these lands, whether for the purpose of resale or for development as a building estate. . . . . I am really left to guess at the reasons, if any, which led to the introduction in the conveyance of October 23, 1908, of the purchaser's covenant." In these circumstances, the learned judge declined to draw the conclusion that the covenant was inserted in the conveyance for the protection of all the other lands of the Shoreham Company so as to enable them to dispose of such lands to the best advantage. And he was justified in so doing. It is impossible to ascertain whether all or some, and if so which, part of such lands were capable of being protected by the reservation of the covenant. When, therefore, by indentures of October 19, 1920, and October 15, 1921, the Shoreham Company and the Seaside Company (to whom the Shoreham Company had previously sold the whole of their still unsold lands) purported to assign to the defendant Easter the benefit of the restrictive covenant, there can be no sure ground for thinking that any of such still unsold lands were lands for the protection of which the covenant had been obtained. It is plain that at that time all the lands coloured green had been disposed of. The defendants have accordingly failed to show that there is now vested in them, or either of them, the right to enforce the restrictive covenant contained in the deed of October 23, 1908. It is not necessary, in these circumstances, to consider the question whether, in any case, the right to enforce the restrictive covenant against the assigns of the covenantors had not come to an end when the Shoreham Company conveyed to the Seaside Company the whole of their lands still remaining unsold without assigning at the same time the benefit of the covenant. It is only necessary to say that

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it appears to us more than doubtful whether in the contract for sale that preceded that conveyance the benefit of the covenant was included.

It only remains to consider the question whether the restrictive covenant contained in the deed of May 11, 1909, is enforceable against the plaintiff by the defendants. This question can be dealt with quite shortly. There is no indication whatsoever to be found in the conveyance that the benefit of the restrictive covenant by Phillips was annexed to any other defined land belonging to Bury so as to pass with it to subsequent purchasers from him of such land. The right to enforce the covenant would not therefore pass to any such purchaser, unless the covenant was obtained by Bury for the purpose of enabling him to dispose of the remainder of his land to the greatest advantage, and unless the benefit of the covenant were expressly assigned by Bury to such purchaser before Bury had disposed of the whole of his land. Inasmuch as at the date of the assignment by Bury to the defendants of the benefit of the covenant, Bury had disposed of the whole of his land, the defendants could not in any case acquire from him any right to enforce the covenant, and it is unnecessary to consider whether such covenant was or was not imposed for the benefit of any and what other land retained by Bury on the occasion of the sale to Phillips.

The result is that we agree with Bennett J.'s decision upon both questions raised by the originating summons. The appeal fails and must be dismissed with costs.

Appeal dismissed.

Solicitors for appellants: *Surtees & Co.*

Solicitors for respondent: *Palmer, Bull & Co., for F. W. A. Cushman & Son, Brighton.*

W. I. C.

In re AIREDALE CO-OPERATIVE WORSTED MANUFACTURING SOCIETY, LIMITED.

EVE J.
1933
March 6, 7, 20.

[No. 00805 of 1932.]

Company—Winding-up—Co-operative Society—Loans borrowed from another Society—Revision of Rules—Ultra vires the Debtor Society—Loan applied in Payment of trading Debts—Lenders entitled to rank as Creditors—Subrogation—Industrial and Provident Societies Act, 1893 (56 *&* 57 *Vict. c.* 39), *s.* 58.

In 1882 the C. Co-operative Society subscribed and paid for ten 1*l.* shares in the A. Co-operative Society, a manufacturing society of which it was a customer, and shortly afterwards agreed by resolution of both societies that all interest on those shares, and all dividends payable out of surplus profits, and all bonuses to which the C. Society might become entitled on purchases of goods from the A. Society should not be drawn, but should be lent by the C. Society to the A. Society, as and when they became payable.

In pursuance of this agreement all such moneys were transferred to a loan account kept by the A. Society. In 1891 the agreement was extended to ten more 1*l.* shares in the A. Society then acquired by the C. Society. The loans so made were within the rules of the A. Society down to November, 1884, when new rules were adopted requiring all loans to the society to be secured by mortgage or bond signed by at least three members of the committee of management.

In February, 1931, the A. Society, being then insolvent, passed a resolution for voluntary winding-up. The C. Society claimed to prove for 523*l.* 0*s.* 6*d.* as moneys owing to them under the above loan agreements. The liquidators rejected the proof on the ground that the moneys were borrowed ultra vires the rules of the A. Society.

On a summons taken out by the C. Society to review the rejection :—

Held, that all moneys so borrowed before the new rules came into force in November, 1884, were validly borrowed, but all subsequent loans were ultra vires. There being, however, uncontradicted evidence that all the moneys so borrowed were applied in payment of the legitimate trading debts of the A. Society, the C. Society were entitled to rank as creditors for the full amount of the loans under the equitable doctrine of subrogation.

Sinclair v. *Brougham* [1914] A. C. 398 applied.

SUMMONSES in the winding-up of the Airedale Co-operative Worsted Manufacturing Society.

The summonses were taken out by the Congleton Equitable and Industrial Co-operative Society and the Co-operative Productive Federation, Ld., respectively asking that the decision of the liquidator of the Airedale Society rejecting proofs for 523*l.* 0*s.* 6*d.* and 332*l.* 2*s.* 7*d.* tendered by the creditors on the ground that the debts were incurred ultra vires the Airedale Society might be reviewed.

The facts are stated shortly in the headnote, and fully in the judgment of the learned judge.

Philip Sykes for the applicants. The money borrowed from the Congleton Society was not borrowed ultra vires the rules. The material rule only points out certain ways of borrowing, and does not prohibit other ways. At least all the money borrowed before 1884 was lawfully borrowed, intra vires the rules of 1874. Until then the committee was empowered to borrow money in any way they thought best. Loans so borrowed were not invalidated by the alteration of the rules in 1884.

As to loans made and shares purchased in 1891 the rule then in force as to loans was merely directory and not imperative: see rule 19, sub-r. 7.

Secondly, assuming that the loans were contracted ultra vires the Airedale Co-operative Society, the lenders have the equitable right of subrogation, to be repaid money proved to have been legitimately applied in paying off the debts of the Society: see Buckley on Companies, 11th ed., pp. 169 and 170.

The result of the authorities is that where the money borrowed has been applied in paying off legitimate indebtedness of the company, the lenders are, to that extent, entitled to rank as creditors of the company: *Blackburn Building Society* v. *Cunliffe, Brooks & Co.* (1); *In re Cork and Youghal Ry. Co.* (2); *Baroness Wenlock* v. *River Dee Co.* (3); *In re Wrexham, Mold and Connah's Quay Ry. Co.* (4) In the latter case Lindley M.R. criticized part of the judgment of Fry L.J. in *Baroness Wenlock* v. *River Dee Co.* (3) He considered that the subrogation theory had been used to account for the decisions ultimately arrived at, but it was not required to support them, and should not be extended or pushed to its logical conclusion. Lindley M.R. re-asserted the principle correctly. The same principle was applied in the Birkbeck Bank case, *Sinclair* v. *Brougham.* (1) In that case the moneys borrowed were employed in an ultra vires business, that of banking, by the Birkbeck Building Society, and not in paying off legitimate indebtedness of the company. See especially per Lord Parker. (2)

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(1) (1882) 22 Ch. D. 61; (1884) 9 App. Cas. 857.

(2) (1869) L. R. 4 Ch. 748.

(3) (1887) 19 Q. B. D. 155.

(4) [1899] 1 Ch. 205, 440, 447.

I submit that the effect of the present transactions, by which interest, dividends on shares and bonus on purchases were transferred to a loan account, was that the Airedale Society was borrowing from Congleton for the purpose of paying its trading debts. These sums must have been used in purchasing goods for the Airedale Society. The transaction is taken out of the doctrine of ultra vires for the reasons given by Lindley M.R. in *In re Wrexham, Mold and Connah's Quay Ry. Co.* (3)

C. W. Lilley for the liquidator of the Airedale Society. There are other claims in the liquidation similar to this, involving a total amount of about 3000*l.*, so that this is a test case. The liquidator's duty is not to admit to proof claims under ultra vires loans, until the Court has directed otherwise.

I admit that in respect of loans incurred before the rules of 1884 came into force, they were not ultra vires the society. But the new rules created a new contract, and after that date the directors could only borrow by means of giving mortgages or bonds to secure the loans, and these had to be signed by at least three members of the committee of management. The rule is not merely directory, and the society could not contract a loan except upon those terms.

For a person to have a right of proof he must be a creditor of the company, and this is not a debt either at law or in equity upon which a winding-up petition could have been founded: *In re National Permanent Benefit Building Society.* (4)

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(1) [1914] A. C. 398.

(2) Ibid. 440.

(3) [1899] 1 Ch. 440.

(4) (1869) L. R. 5 Ch. 309.

The principle of subrogation is not to be extended to cases, such as the present, in which it has never been applied before.

There may be a remedy of some kind here, but a tracing would not give rise to a provable debt. The question is whether the applicants have discharged the onus of proving that the money has been used to pay the debts of the society.

There are passages in Lord Parker's judgment in *Sinclair* v. *Brougham* (1) which are very difficult to reconcile with each other. It is clear that no action for money had and received would lie in the present case: *In re Guardian Permanent Benefit Building Society.* (2) In that case a tracing order was made. And see Bankruptcy Act, 1914, s. 30.

Philip Sykes in reply referred to the Companies Act, 1929, s. 261. The society could not by any alteration of its rules commit a breach of contract.

Similar arguments were used on the second summons.

Cur. adv. vult.

March 20. EVE J. This is a summons issued in the voluntary winding-up of the Airedale Co-operative Worsted Manufacturing Society, Ld. (hereinafter referred to as "Airedale"), by the Congleton Equitable and Industrial Co-operative Society, Ld. (hereinafter referred to as "Congleton"), to review the rejection by the liquidators of Airedale of a proof for 523*l.* 0*s.* 6*d.* carried in by Congleton. The ground of rejection is that the amount claimed represents wholly or in part a debt which Airedale never had any power to contract. Congleton does not accept this view, and the summons has been issued to test the question whether the claim is maintainable or not. The amount is not in dispute.

Congleton is and at all material times has been authorized under its rules to invest its surplus funds by lending the same to societies registered under the Industrial and Provident Societies Act, 1893, or in the subscription or purchase of

(1) [1914] A. C. 440.

(2) (1882) 23 Ch. D. 440.

shares in any such society; and in the exercise of these powers, in April and May, 1882, it subscribed for and paid up in full twenty shares of 1*l*. each in Airedale.

The rules of Airedale have at all material times provided for the raising of capital in shares of 1*l*. each, and for the net profits of all business carried on by Airedale (after making certain provisions and allowances as in the rules is more particularly set out) being applied in payment of interest on capital paid up on shares at 5 per cent. per annum, and thereafter being divided at an equal rate per pound between capital, labour and purchasers' bonus.

By two agreements come to in or about July, 1882, it was agreed between Congleton and Airedale that all sums representing interest on the shares in Airedale then held by Congleton, together with all dividends on such shares (representing capital's share of the surplus profits after paying interest on the shares at 5 per cent. per annum), and also the share of the surplus profits of Airedale to which Congleton should from time to time become entitled in respect of purchases by Congleton from Airedale, should in like manner be lent by Congleton to Airedale.

Pursuant to these agreements, which do not appear to have been reduced into writing but were entered into by resolutions of the respective committees of management, all such interest, dividends and moneys were forthwith upon becoming payable to Congleton transferred by Airedale to an account known as " the loan account " kept by Airedale, receipts being given therefor in a book called the Investment Book, and it is in this manner that the amount for which Congleton seeks to prove has been accumulated.

It is not suggested that the agreements and the borrowings thereunder were otherwise than in accordance with the rules of Airedale down to November 27, 1884, but on that date new rules were adopted, and the contention of the liquidator is that the borrowing powers of Airedale were thereby so revised as to invalidate thenceforward the agreements of July, 1882, and to restrict the borrowing powers to those sanctioned by the new rules.

I need not at the moment refer to the rules of Airedale in force in 1882 and down to November 27, 1884. They were the rules adopted in February, 1874. It is conceded that the transactions under the agreements of July, 1882, were within these rules, and it has been argued that as the agreements were validly entered into and remained valid down to the moment when the new rules were adopted, they ought not to be held to have been abrogated by the alteration of the borrowing powers.

I cannot accept that view. The agreements contemplated a succession of half-yearly borrowings, and at each half-yearly distribution of interest, profits and other moneys Airedale borrowed a further sum equal to the amount payable to Congleton as one of its members. Unless this method of borrowing is sanctioned by the new rules I do not see how the agreements could logically be held to survive the change.

This brings me to the question whether the rules of 1884 sanction the raising of money on loan in the manner adopted in 1882. Rule 7 of the 1884 code is the relevant one. It was amended in February, 1923, by the introduction in line 6 after the word " bonds " of the words " or agreements," but this amendment does not affect the question now under consideration. The rule as amended is in these terms: " The committee of management may obtain, by way of loan, from any person or persons, or from any society or company, for the purposes of this society, from time to time (by way of mortgage of the whole or any part of the property they possess, or by bonds, or agreements, signed by at least three of the committee of management), any sum or sums of money not exceeding two-thirds of the paid-up share capital, at such rate of interest, not exceeding 5 per cent. per annum, and subject to such provisions for repayment as may be agreed upon. They may also within the same total limit obtain advances from the society's bankers, and give continuing security by mortgage, legal or equitable, under the seal of the society, of any property they possess, for the money which may be owing on account of the society with the bankers. The society shall not receive money on deposit."

I cannot read this rule as authorizing the raising of money by borrowing from the members without any security the interest and dividends payable on their shares and the bonus on their purchases. Indeed, Rule 13, of 1884, so far from contemplating any retention of interest, dividend or bonus, provides that: "No interest shall be paid on interest or dividends due to members not withdrawn."

As showing how much more stringent are the rules of 1884 than were those of 1874, I need only point out that by the latter the committee of management were empowered to obtain loans "by way of mortgage or bonds or in such other manner as they should deem best."

It comes therefore to this, that in my opinion the transactions under the agreements of 1882 were valid and within the borrowing powers conferred on Airedale by the rules of 1874, that all moneys advanced thereunder to Airedale down to November 27, 1884, with interest thereon at 5 per cent. per annum, are provable in the winding-up, that all subsequent borrowings from Congleton were ultra vires of Airedale by reason of the determination of the agreements brought about by the new rules of 1884, and that the amounts claimed by Congleton must be split up and divided into borrowings respectively prior and subsequent to November 27, 1884. The former will be treated as intra and the latter as ultra vires.

The further question remains whether Congleton has any remedy in respect of these latter borrowings. I think the answer is to be found in a passage from Lord Parker's speech in *Sinclair* v. *Brougham.* (1) He says that according to the authorities it appears to be well settled that if the borrowed money be applied in paying off legitimate indebtedness of the company or association (whether the indebtedness be incurred before or after the money was borrowed), the lenders are entitled to rank as creditors of the company or association to the extent to which the money has been so applied.

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(1) [1914] A. C. 398, 440.

It has been pressed upon me that this is pre-eminently a case for the application of that doctrine, for the moneys lent were on each occasion and immediately applied to extinguish the indebtedness of the borrowers to the lenders in respect of interest, dividends or bonus already ascertained and credited to the lenders. I doubt if this is a well-founded argument, for the loan did not reduce the indebtedness of the society; the nature of the liability was changed, but the indebtedness remained and the creditors were the same. But I do not think it is necessary to rest on this submission, for in this case I have evidence, not contradicted or cross-examined to, that the balance-sheets of Airedale show that the loans were necessary to enable the receipts to balance expenditure and that all expenditure was applied in paying the proper debts of Airedale.

I hold, therefore, that Congleton is entitled to prove also for so much of their claim as represents loans made subsequent to November 27, 1884. There will be an order accordingly, and, as the result of the summons will no doubt assist in other cases, the costs of all parties will be taxed as between solicitor and client and paid out of the assets of Airedale.

In the case of the Co-operative Productive Federation, Ld. (hereinafter referred to as "Productive Federation"), a summons has also been launched to review the rejection by the liquidators of Airedale of a claim to prove in the winding-up for an alleged indebtedness of 332*l*. 2*s*. 7*d*.

Productive Federation is, and at all material times has been, empowered by its rules to invest its surplus funds by lending the same to societies registered under the Industrial and Provident Societies Act, 1893, and in November, 1923, advanced to Airedale a sum of 300*l*. by way of loan for a period of twelve months at 5 per cent. interest. The borrowing was outside the powers of Airedale, but the capital when received was immediately applied in reducing pro tanto a debt to its bankers which Airedale had lawfully incurred. The 332*l*. 2*s*. 7*d*. represents the capital sum and interest remaining due from Airedale to Productive Federation at the date of the winding-up.

The considerations which have led me to the conclusion that Congleton is entitled to be admitted as a creditor in the winding-up of Airedale apply with even greater force to this case, and I hold that on this application Productive Federation succeeds, and must be allowed to prove. There will be the same order as to costs as I have made in Congleton's case.

Solicitors: *Haslewood, Hare & Co., for Aston, Harwood, Somers & San Garde, Manchester; Blundell, Baker & Co., for Mumfords & Gordons, Bradford.*

H. L. L.

MAUGHAM J.
1933
Feb. 20; *March* 6.

In re TEA TRADING COMPANY K. AND C. POPOFF BROTHERS.

[No. 0062 of 1933.]

Company—Winding Up—Russian Company—Place of Business in England—Unregistered Company—Dissolution in Russia—Service in England of Petition to Wind Up—Companies Act, 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *s.* 338, *sub-s.* 1, *para.* (*d*)—*R. S. C., Order* LXVII., *r.* 6—*Companies* (*Winding Up*) *Rules*, 1929, *r.* 28.

By s. 338, sub-s. 1, para. (*d*), of the Companies Act, 1929: "The circumstances in which an unregistered company may be wound up are as follows:—(i.) If the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding up its affairs; (ii.) If the company is unable to pay its debts; (iii.) If the court is of opinion that it is just and equitable that the company should be wound up."

By r. 6 of Order LXVII. of the Rules of the Supreme Court: "Where personal service of any writ, ... or other document, ... is required by these Rules or otherwise, and it is made to appear . . . . that prompt personal service cannot be effected, the Court or Judge may make such order for substituted or other service, or for the substitution of notice for service by letter, public advertisement, or otherwise, as may be just."

By r. 28 of the Companies (Winding Up) Rules, 1929: "Every petition shall, ... be served upon the Company . . . . if there is no registered office, ... at the principal or last known principal place of business of the Company, ... by leaving a copy with any member, officer, or servant of the Company there, or in case no such member, officer, or servant can be found there, then by leaving a copy at such . . . . principal place of business, or by serving it on such member, officer or servant of the Company as the Court may direct ; . . . ." :—

Held, that the Court can wind up a foreign company which has carried on business within the jurisdiction, even if the company has ceased to exist, and that if there is no member, officer, or servant of the company on whom the petition to wind up can be served, the service must be effected, not under Order LXVII., r. 6, of the Rules of the Supreme Court, but under r. 28 of the Companies (Winding Up) Rules, 1929, by leaving a copy of it at the company's " last known principal place of business " within the jurisdiction.

PETITION.

Tea Trading Company K. and C. Popoff Brothers (hereinafter called " the company ") was incorporated in 1885 under the laws of the Russian Empire as a company with limited liability with its principal place of business in Moscow. Its regulations authorized it to open branches in other parts of Russia and elsewhere, and a branch was opened in London in or about 1902. The company carried on business in London for some time after 1917 (the year of the Bolshevik Revolution), and in December of that year there were filed with the Registrar particulars of the company under s. 274 of the Companies (Consolidation) Act, 1908, including the statement that the person in the United Kingdom authorized to accept service on the company's behalf was the petitioner's husband, who was at all material times the company's manager in London until his death in 1922. The petition stated that the company incurred many debts in the United Kingdom, where it had at all material times, and purported to have at the date of the petition, considerable assets, and that it was indebted in certain sums to the petitioner as her husband's administratrix. There was evidence that the company, in common with other Russian companies, had ceased to exist as such, and that it was impossible to serve the petition on it in Russia or elsewhere. The petitioner submitted that in the circumstances the company was an unregistered company within s. 338, sub-s. 1, para. (*d*), of the Companies Act, 1929, and should be wound up. Under Order LXVII., r. 6, of the Rules of the Supreme Court, the Registrar had made an order for the substitution of notice for service by public advertisement, and advertisements purporting to effect service on the company had been inserted in the London Gazette and a newspaper.

H. S. G. Buckmaster for the petitioner. This is the first time that it has been sought to apply the provisions of s. 338, sub-s. 1, para. (*d*), of the Companies Act, 1929, to a company that has been dissolved. In that provision the Legislature must have had in mind service on a dissolved company, and the same provisions must apply to serving a dissolved company as to serving a company still in existence. Rule 28 of the Companies (Winding Up) Rules, 1929, applies to the present case. The "last known principal place of business of the company" in this country is known. It was its only place of business in this country and a copy of the petition can be left there.

Stafford Crossman for the Crown. This is a case in which it is clear that no service can be strictly effected. There must be service in accordance with some rule. It is better in this case that it should not be by advertisement, which of all possible methods is the most unlikely to produce any effect. Rule 28 of the Companies (Winding Up) Rules, 1929, covers the case. The company has a "last known principal place of business," and if the petition is left there there will be compliance with the rule.

MAUGHAM J. The point that arises here is of some general importance in relation to Russian and other foreign companies which, having carried on business in this country pursuant to the provisions of the Companies Act, 1929, have now ceased to carry on business, the normal cause of their so ceasing to carry on business having been the legislation in Russia following the October Revolution of 1917.

The question that arises is how a petition to wind up such a company, which is (or was) an unregistered company within the meaning of the Act, is to be made effective. The Act, under s. 338, obviously contemplates the winding up of such an unregistered company, notwithstanding that it has been dissolved or has otherwise ceased to exist as a company under or by virtue of the law of the country in which it was incorporated. It must be wound up on petition, and the petition must be served.

In the present case the company carried on business in London for a considerable period, and its last known principal place of business in London is known. There is, however, a difficulty about serving the person in this country authorized to accept service on the company's behalf. That person was at all material times the London manager of the company, who unfortunately died as long ago as April 19, 1922, and it is clear that a petition cannot be served on a dead man. The Registrar made an order under which service on the company purports to have been effected by advertisement in the London Gazette and the Daily Telegraph. In making that order I understand he relied on Order LXVII., r. 6, of the Rules of the Supreme Court. I should not, of course, have interfered with his order in any way if it had been possible for the company to appear, and if it had appeared and had made no objection to the service; but, the petition being founded on the allegation that the company has ceased to exist, it seems to me I have got to see that there has been a proper service according to the rules which authorize such a petition to be served on a company that does not any longer exist. In my opinion, Order LXVII., r. 6, is limited, as Lord Coleridge C.J. pointed out in *Field* v. *Bennett* (1), to cases where the writ itself or other document, including, in my view, the petition, can be served personally as a matter of law, but where it cannot in the circumstances be promptly served personally in matter of fact. Here there can be no real ground for suggesting that the petition could

(1) (1886) 56 L. J. (Q. B.) 89.

be served personally on the company, for the reason that it is a non-existent entity. On the other hand, the Companies (Winding Up) Rules, 1929, and in particular r. 28, seem to provide a method of serving a petition which will be effective as a compliance with the rules, and, so far as I can see, that is the best if not the only way of dealing with an unregistered company which has been dissolved or has otherwise ceased to exist. That rule provides [His Lordship read it and continued:] In my opinion it is reasonably clear that "registered office" there means "registered office within the jurisdiction," and that "last known principal place of business" refers to the last known principal place of business of the company within the jurisdiction. The rule contemplates, first, that there will no longer be any business carried on by the company; secondly, that you can ascertain the last known principal place of business of the company within the jurisdiction; thirdly, that you will be unable to find (as, of course, you are unable in this case to find) any member, officer, or servant of the company; and finally, that the service of such a petition will properly be effected by leaving a copy at that registered office or principal place of business. It seems to me that if that is done the petition will be duly served, and the Court will then have jurisdiction under s. 338 of the Act. As I have already said, the section carries with it the implication that even a company that has wholly ceased to exist can be wound up, and the rules under the Act provide the method by which that can be done.

On the whole, I think the better course will be to follow the provisions of r. 28, and to restore the petition.

March 6. The petition having been restored to the list, his Lordship made the usual compulsory winding up order, observing that the order would be without prejudice to any claim of the Crown to the company's assets as bona vacantia.

Solicitors: *Herbert Oppenheimer, Nathan & Vandyk; Treasury Solicitor.*

K. R. A. H.

LUXMOORE J.

1933

Feb. 17.

In re FULLER'S CONTRACT.

[1932. F. 1983.]

Partnership—Real Estate—Conveyance to Purchasers—To hold as Joint Tenants as part of Co-partnership Estate—Property held by Survivors on January 1, 1926*—Contract to Sell—Title—Undivided Shares—Trust for Sale—Statutory Trusts—Law of Property Act*, 1925 (15 *Geo.* 5, *c.* 20) *Sch. I., Part IV., para.* 1 (1.).

A partnership firm in 1932 contracted to sell certain plots of freehold land to a county council. There was no special stipulation as to the commencement of title, but on examination by the purchasers it appeared that the land had been sold in 1892 to six named persons then carrying on the partnership firm, the habendum of the conveyance being to hold the hereditaments "unto and to the use of the purchasers . . . . as joint tenants in trust for them the purchasers . . . . as part of their co-partnership estate."

On January 1, 1926, the land in question was vested in three of the original purchasers in fee simple as joint tenants in trust as mentioned in the conveyance of 1892. The vendors to the county council were the four present partners, and included two of the three original purchasers living on January 1, 1926, one of those purchasers having died since that date. Questions having arisen whether the land, being on January 1, 1926, partnership property, was held on the statutory trusts, and therefore whether the present vendors or any of them could make a good title as trustees for sale by reason of the Law of Property Act, 1925, First Schedule, Part IV. :—

Held, that the words of that Schedule applied, and on January 1, 1926, the property was held by the three original purchasers then living on the statutory trusts and that the two survivors could make a good title as trustees for sale upon the statutory trusts.

VENDOR AND PURCHASER SUMMONS.

By a contract dated January 25, 1932, four persons therein named carrying on business in partnership at the Griffin Brewery, Chiswick, and therein called "the vendors," according to their respective estates contracted to sell to the Middlesex County Council certain plots of freehold land situated in Chiswick in the county of Middlesex for an estate in fee simple in possession. The land was divided into plots, coloured pink on a plan, and numbered thereon 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11. There was no special stipulation as to the commencement of the title to be shown by the vendors. Abstracts were delivered and the title to plots 3 to 9 inclusive (with the exception of a small strip of plot 9 which was included in the title to plot 10) was shown as commencing with a conveyance dated July 28, 1892, and whereby for the consideration therein mentioned the land comprised in these plots appeared as having been sold and conveyed by the Ecclesiastical Commissioners to six named persons carrying on business together as brewers under the name of Fuller, Smith & Turner at the Griffin Brewery, Chiswick, and therein referred to as "the purchasers."

Two of these original purchasers were two of the vendors in the contract dated January 25, 1932.

The habendum in the conveyance of July 28, 1892, was in the following terms: "To hold all the said hereditaments and premises unto and to the use of the purchasers their heirs and assigns as joint tenants in trust for them the purchasers their executors administrators and assigns as part of their co-partnership estate."

On January 1, 1926, the freehold plots 3 to 9 inclusive (with the exception of the small strip of plot 9 above mentioned) were vested in three of the original purchasers (including, as above stated, two of the four vendors to the contract of January 25, 1932) in fee simple as joint tenants in trust as expressed in the conveyance of July 28, 1892. The third of the original purchasers in 1892 died in 1927.

After the contract of January 25, 1932, had been entered into, requisitions on title relating (inter alia) to the above mentioned plots were duly delivered by the purchasers (the Middlesex County Council), and a question arose whether a trust for sale had come into effect by reason of the Law of Property Act, 1925, Sch. I., Part IV.; and therefore whether the vendors or any of them had made out a title to sell as trustees for sale by reason of the plots of land contracted to be sold having become subject to the statutory trusts.

A similar question arose with regard to the other plots contracted to be sold by the four vendors, although there was a different devolution of title to the property to them. The learned judge, however, only dealt with the plots referred to above, which had been conveyed in 1892.

A summons was accordingly taken out by the purchasers for the determination (inter alia) of the question whether the vendors or any and which of them had made out a title to sell the above mentioned plots as trustees for sale on the ground that the said plots being on January 1, 1926, partnership property were held on the statutory trusts or on any other ground.

J. M. Lightwood for the purchasers. The question is whether the vendors had made out a good title to sell as trustees for sale on the ground that the plots being on January 1, 1926, partnership property are held on the statutory trusts. It is necessary to consider the First Schedule, Part IV., of the Law of Property Act, 1925. Looking at the facts in this case, on January 1, 1926, these plots were vested in several persons; did they therefore hold in undivided shares for persons entitled? It should be remembered that it is partnership property: for differences between co-ownership and partnership see Lindley on Partnership, 9th ed. (1924), p. 28 and p. 429. The remarks of Romer L.J. in *In re Bourne* (1) as to the interest of the partnership in real estate are relied on, and also those of Lord Finlay in *Rodriguez* v. *Speyer Brothers* (2) and Chitty L.J. in *In re Ritson.* (3) The principle applies equally to land. A partner cannot say he has a share in land and therefore not an undivided share.

Sect. 36 of the Law of Property Act, 1925, should be considered. Applying that section to the facts in this case, one has to consider whether the legal estate is beneficially limited to the purchasers or held in trust. In this case no land is beneficially limited to the partners as joint tenants: see note in Wolstenholme and Cherry's Conveyancing Statutes, 12th ed., vol. i., p. 283.

J. H. Stamp for the vendors, respondents to the summons. The question here is, it is submitted, whether partners have

(1) [1906] 2 Ch. 427, 432, 433.
(2) [1919] A. C. 59, 68.
(3) [1899] 1 Ch. 128, 131.

any interest in their partnership assets. All *In re Bourne* (1) decided was that in the case of partnership property there was no difference between land and chattels. Sect. 20 of the Partnership Act, 1890, should be considered, and also whether Part IV. of the First Schedule to the Law of Property Act, 1925, really affects the question now before the Court.

J. M. Lightwood in reply.

LUXMOORE J. The question which I have to determine is whether the survivors of a number of persons who were partners in a firm when real property was conveyed to them a number of years ago are now, by reason of the provisions of the Law of Property Act, 1925, able to sell as trustees for sale.

The question arises in this way. In 1892, six gentlemen constituted the firm of Fuller, Smith & Turner, and at that date certain property at Chiswick was conveyed to them, the habendum in the conveyance being in these words: "To hold all the said hereditaments and premises unto and to the use of the purchasers their heirs and assigns as joint tenants in trust for them the purchasers their executors administrators and assigns as part of their co-partnership estate." On January 1, 1926, three of the six original purchasers were still living, and the question is whether, by reason of the coming into force of the Law of Property Act, 1925, the statutory trusts for sale affected the property on that date.

By Sch. I., Part IV., para. 1, of the Law of Property Act, 1925, it is provided that: "Where, immediately before the commencement of this Act, land is held at law or in equity in undivided shares vested in possession, the following provisions shall have effect:—(1.) If the entirety of the land is vested in trustees or personal representatives . . . . in trust for persons entitled in undivided shares, then"—I am reading it shortly, as far as it applies to this case—"(*b*) . . . . the land shall be held by such trustees . . . . upon the statutory trusts." There is no doubt that the three surviving partners on

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(1) [1906] 2 Ch. 427, 433.

January 1, 1926, held this property as trustees. The question is whether they held it in trust for persons entitled in undivided shares. They held it as part of the partnership property, and it is said that because it was partnership property it cannot be held for persons in undivided shares.

My attention has been called to a statement by Romer L.J. in *In re Bourne* (1), on which reliance is placed by Mr. Lightwood in support of his argument. The passage he relies upon is: "It is to be borne in mind that the real interest of the partnership in real estate is of a personal character, because wherever the legal estate may be, whether it is in the partners jointly or in one partner or in a stranger it does not matter, the beneficial interest in the real estate belongs to the partnership, with an implied trust for sale for the purpose of realizing the assets and for the purpose of giving to the two partners their interests when the partnership is wound up and an account taken. So that no real distinction can be drawn, it appears to me, between real estate held for partnership purposes and personal estate." It is said that this statement is equivalent to a decision that a partner has no beneficial interest in the partnership real estate that he can point to and say: "I have an interest in that particular property." I am unable to accept that view. I think Romer L.J. was only pointing out that the beneficial interest in the real estate belonged to the partnership, that is, to those persons who constituted the partnership, and that those persons were together entitled to the partnership property. Of course, as between the partners, the partnership property must be dealt with in a particular way, but so far as all the rest of the world is concerned, there is no limitation on the interests of the partners; the partners have the beneficial interest in the partnership assets, which are held together as an undivided whole, but they respectively have undivided interests in them.

In my judgment, the words of para. 1 of Part IV. of the Schedule cover this case, and on January 1, 1926, the property was held by the three persons named upon the statutory trusts.

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(1) [1906] 2 Ch. 427, 432, 433.

I do not think I need deal with the facts with regard to the other properties which are included in the contract for sale, because so far as the point raised is concerned there is no distinction between any of the particular cases.

In the result I hold that the whole of the property which is affected by the question raised by the summons is held by those of the respective vendors in whom the legal estate was vested on January 1, 1926, who are now living and that it is held by them as trustees for sale under the statutory trusts, and they are therefore able to make a good title.

Solicitors: *Pritchard, Englefield & Co.; Solicitor to the Middlesex County Council.*

A. R. T.

In re BORWICK.

BORWICK *v.* BORWICK.

[1932. B. 3072.]

BENNETT J.
1933
Feb. 1, 2, 3, 7, 8; *March* 1.

Settlement — Construction — Condition subsequent — Infants — Forfeiture of interest if Roman Catholic—Parent's duty—Uncertainty.

A condition subsequent contained in a settlement providing that an interest, which would otherwise have become vested in a grandchild of the settlor on attaining the age of twenty-one years or (being female) attaining that age or marrying, should be forfeited if the grandchild "shall at any time before attaining a vested interest under the trusts hereinbefore declared be or become a Roman Catholic or not be openly or avowedly Protestant" is void, on the ground that it operates to interfere with a parent in the exercise of his parental duty as regards the religious instruction of his children.

Egerton v. *Earl Brownlow* (1853) 4 H. L. C. 1 and *In re Sandbrook* [1912] 2 Ch. 471 referred to.

ADJOURNED SUMMONS.

The following statement of the facts is substantially taken from his Lordship's considered judgment:—

By a deed poll dated August 31, 1910, Lord Borwick of Hawkshead, one of the plaintiffs, who was then Sir Robert

Hudson Borwick, made a settlement of ordinary stock in Arthur Guinness, Son & Co., Ld., for the benefit of his children and grandchildren. By clause 4 of this deed poll four sums of such stock each of 10,000*l.* were appropriated for four daughters of the settlor—namely, Clarice May Warner (wife of William Ward Warner); Vanessa Margaret Dormer (wife of Edward Henry Dormer); Mary Dorothea Woodman (wife of Leonard Cecil Woodman); and Nancy Beatrice Croft (wife of Henry Page Croft). Another sum of 10,000*l.* of such stock was appropriated for Robert George Alec Morris and the defendant Gweneth Caulfield, then Gweneth Morris, the two children of Hilda Morris, a deceased daughter of the settlor.

By clause 5 of the deed poll trusts were declared of these five sums of stock, the sums appropriated to the settlor's said four daughters being referred to as the daughters' portions, and the sum appropriated for the said children of the deceased daughter being referred to as the grandchildren's portions. After provisions giving to each of the settlor's said four daughters a protected life interest in the sum of stock appropriated to her the clause contained a declaration that the trustee of the said deed poll should stand possessed of the grandchildren's portions and the investments for the time being representing the same, and from and after the death of each daughter of the said Sir Robert Hudson Borwick (other than the said Hilda Morris) of the share of each daughter upon trust as to both the capital and income thereof for all or any the grandchildren or grandchild (including the children of the said Hilda Morris) of the said Sir Robert Hudson Borwick being a child or children of all or any of his same five daughters who being male should attain the age of twenty-one years, or being female should attain that age or marry if more than one in equal shares as tenants in common per capita and not per stirpes.

Clause 6 of the deed poll is in the following terms: "Provided always and the said Sir Robert Hudson Borwick doth hereby direct and declare that the actual division and distribution of the daughters' portions and the grandchildren's portions shall not take place until the death of the last survivor of all the four daughters of the said Sir Robert Hudson Borwick namely the said Clarice May Warner Vanessa Margaret Dormer the wife of Edward Henry Dormer Mary Dorothea Woodman the wife of Leonard Cecil Woodman and the said Nancy Beatrice Croft and that until that event shall happen the trustee may in his discretion and subject to the provisions contained in clause 9 hereof apply the whole or any part of the income of the portion of any deceased daughter (including for this purpose the grandchildren's portions as being the portion of the deceased daughter Hilda Morris) for the maintenance education advancement or for travelling expenses or otherwise for the benefit of the children or child (whether minors or of full age) of such deceased daughter (including the said Hilda Morris) but so that not more than 500*l.* per annum be applied in favour of any one child and so that the trustee may either himself apply the same or may pay the same to the guardians of the children or child or may pay the same to the children or child personally if of full age And shall until the expiration of a period of 21 years after the date of these presents invest and accumulate the surplus of such income in augmentation of the capital of the share from which it shall have proceeded."

Clause 15 of the deed poll contains provisions forfeiting in part the interests of the beneficiaries thereunder upon the happening of specified events. The provisions of this clause relevant to the questions which I have to decide are as follows: And that if any grandchild of the said Sir Robert Hudson Borwick shall at any time before attaining a vested interest under the trusts hereinbefore declared be or become a Roman Catholic or not be openly or avowedly Protestant such grandchild shall thereupon forfeit and lose one moiety of all the share right or interest in the capital or income of the said trust premises and of all other benefits (if any) conferred upon him or her by these presents, and all the share interest and benefit of any grandchild so forfeited and lost as aforesaid whether original or accruing under this provision shall go to and be divided among or held in trust for the person or persons who would have been entitled thereto if such grandchild incurring such forfeiture had thereupon died and if more than one in the shares in which they would have been so entitled thereto.

There were eight grandchildren of the settlor and children of his said daughters living at the date of the deed poll of whom the eldest was just under thirteen years of age and the youngest was one year and six months old. Since the date of the deed poll one of these has died, and five children of the settlor's daughters have been born and are still living. Of these, four are still infants, the youngest being the defendant Geoffrey Henry Dormer, who will be thirteen years old on May 13, 1933. The settlor's daughter, Vanessa Margaret, married Captain Edward Henry Dormer on June 24, 1903. He was, and is, a Roman Catholic. Their three children, the defendants Robert Francis Edward Baptiste Dormer, Margaret Mary Wilberforce, and Geoffrey Henry Dormer, were baptized in accordance with the rites of the Roman Catholic Church, and with respect to these three defendants the affidavit of the plaintiff Robert Geoffrey Borwick, filed on behalf of the plaintiffs, contains these statements in paras. 11, 12 and 13: "(11.) The defendant Cecilia Margaret Mary Wilberforce was baptized a Roman Catholic and has remained and still is a Roman Catholic. (12.) The defendant Robert Francis Edward Baptiste Dormer was baptized a Roman Catholic but some years ago changed his religion. (13.) The infant defendant Geoffrey Henry Dormer was baptized a Roman Catholic and still is a Roman Catholic." Mary Dorothea Woodman, one of the said settlor's daughters, died on April 2, 1915.

From the date of the settlement until August 31, 1931, on which date the accumulation period of twenty-one years referred to in the deed poll expired, the trustees of the settlement expended, in accordance with their powers in that behalf, part of the income of the 10,000*l.* portion attributable to the deceased daughter, Mrs. Morris, for the benefit of her children and accumulated the unexpended balance. Since the death of the settlor's daughter, Mrs. Woodman, in 1915 the trustees have similarly accumulated the unexpended part of the income of her 10,000*l.* portion after making payments in accordance with their powers for the benefit of her son, the defendant John Geoffrey Wootton Woodman. All such accumulations have been added to the capital of the stirpital shares whence they respectively arose.

Upon those facts the plaintiffs, who are the trustees of the deed poll, issued the originating summons now before the Court and asked (inter alia): "Whether and if so to what extent the interest of (*a*) the defendant Robert Francis Edward Baptiste Dormer, (*b*) the defendant Cecilia Margaret Mary Wilberforce, and (*c*) the infant defendant Geoffrey Henry Dormer respectively in the surplus income referred to in question (1.) of this summons and in the capital and income generally of the daughters' and grandchildren's portions are in the events which have happened cut down by virtue of the provisions of clause 15 of the said settlement."

No answer was made by the defendant Mrs. Wilberforce or on behalf of the defendant Geoffrey Henry Dormer to the facts deposed to by the plaintiff Mr. Robert Geoffrey Borwick in paras. 11 and 13 of his affidavit. The defendant Robert Francis Edward Baptiste Dormer has filed an affidavit in which he states what he has done and what his own views have been in respect to religious matters since he was a young boy.

Hon. Charles Russell for the applicants.

Vaisey K.C. and *G. D. Johnston* for one of the three grandchildren above referred to. The provision in clause 15 is void. It is uncertain, because the date on which the forfeiture occurs is unascertainable. It is impossible to predicate of an infant that he is of a particular religion, especially when he is to be "openly and avowedly Protestant." An infant cannot, for instance, on the day of his birth be openly and avowedly Protestant. Therefore, if not void for uncertainty, the clause is void because it contains an impossible condition. If the clause had excluded children who were being brought up as Roman Catholics it might not have been void. That the Court would not deal with such an abstruse question as the decision of a child's faith for the purpose of depriving him of a benefit was decided in *In re May.* (1) Having regard to the maintenance and education clauses it is essential to know whether a child is entitled to a whole share or to a moiety.

No child has any discretion to be of any particular religion during infancy. If a child cannot refuse or neglect to take a name and arms, a child cannot choose whether or not he is a Roman Catholic: see *In re Edwards.* (2) The discretion of an infant is involved in clause 15 and, therefore, it is void. Moreover the Court will not allow the discretion of the parent as to the religious education of his child to be fettered by something in the nature of a threat.

[They also referred to *Hirsch* v. *Protestant School Commissioners of Montreal.* (3)]

E. G. Eardley-Wilmot for the remaining two of the three grandchildren. Interference with the discretionary power of the father in this respect is against public policy: see *In re Sandbrook.* (4) The Court cannot give effect to the provision without construing the whole clause. The clause is full of contradictions. The condition here is similar to that in *In re May* (5), where Luxmoore J. applied *In re Sandbrook.* (4)

[He also referred to *In re Borwick's Settlement* (6); *Partridge* v. *Partridge* (7); and *In re Boulter.* (8)]

Fergus Morton K.C. and *Charles Harman* for parties interested in contending for the validity of the clause. A clause of this kind is perfectly good. There is no authority to the contrary. The settlor contemplated that an infant could be or become a Roman Catholic and intended to apply this clause to an infant. Some attention can be paid to the religious views of infants: see *In re W.* (1) The settlor has clearly intended to cut down the shares of the three grandchildren in question by half.

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(1) [1917] 2 Ch. 126.
(2) [1910] 1 Ch. 541.
(3) [1928] A. C. 200.
(4) [1912] 2 Ch. 471, 476.
(5) [1932] 1 Ch. 99.
(6) [1916] 2 Ch. 304.
(7) [1894] 1 Ch. 351.
(8) [1922] 1 Ch. 75.

[They also referred to *In re May.* (2)]

Gavin Simonds K.C. and *David L. Jenkins* for another party interested in contending for the validity of the clause. *In re May* (2) amounts to no more than this—namely, that where there is a condition of this kind the Court is reluctant to give any effect to the condition during the minority of the beneficiary. In the present case it is manifest that the condition must operate during the minority of the beneficiary, because it only arises before the beneficiary attains a vested interest.

Manning K.C. and *C. R. R. Romer* for other parties in the same interest, referred to *Clavering* v. *Ellison.* (3)

Danckwerts for another party in the same interest. The clause arises in the case of infancy, and some meaning must be given to it. As soon as a child has regular views and is not avowedly Protestant he cannot take.

Wilfrid Hunt and *E. J. T. G. Bagshawe* for other parties in the same interest.

Manning K.C. in reply. If this is a condition subsequent and can operate to defeat interests, there is nothing in clause 15 obnoxious to any point of law. It is opposed to no principle of public policy: see *In re Dickson's Trust.* (4) *Hodgson* v. *Halford* (5) shows that as far back as 1879 similar arguments to the contrary were addressed to the Court and rejected.

[He also referred to *Perrin* v. *Lyon* (6) and *Talbot* v. *Earl of Shrewsbury* (7); and to Theobald on Wills, 8th ed., pp. 703, 705.

Cur. adv. vult.

March 1. BENNETT J. [after stating the facts, continued:] On behalf of the defendants other than the defendants

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(1) [1907] 2 Ch. 557.

(2) [1917] 2 Ch. 126; [1932] 1 Ch. 99.

(3) (1859) 7 H. L. C. 707.

(4) (1850) 1 Sim. N. S. 37.

(5) (1879) 11 Ch. D. 959.

(6) (1807) 9 East, 170.

(7) (1840) 4 My. & Cr. 672.

Robert Francis Edward Baptiste Dormer, Cecilia Margaret Mary Wilberforce, and Geoffrey Henry Dormer, it was argued that with respect to each of these last named three defendants each of them was or had become a Roman Catholic before attaining a vested interest in the trust premises, and that accordingly the provisions for forfeiture contained in clause 15 of the deed poll had come into operation, with the result that these defendants respectively had forfeited and lost one moiety of all their shares right or interest in the capital and income of the trust premises and of all other benefit conferred upon them respectively by the deed poll.

For the defendants Robert Francis Edward Baptiste Dormer, Cecilia Margaret Mary Wilberforce, and Geoffrey Henry Dormer, it was argued that the provisions for forfeiture contained in the clause in question were void, because the provisions were contrary to public policy, or uncertain as to the moment of their operation, or impossible of performance. These arguments were founded upon the basis that the provisions in the clause are conditions subsequent framed for the purpose of destroying if and when they are fulfilled an existing interest in property, and being such are to be construed with the same strictness as conditions subsequent framed to destroy a vested interest have to be construed.

It is necessary, therefore, in the first place, to construe the deed in order to decide whether the foundation upon which the defendants concerned rest their arguments exists. In my judgment, it is clear that the capital and income of the daughters' portions and of the grandchildren's portions are by virtue of the provisions contained in clauses 5 and 6 of the deed held in trust for such of the children of the settlor's named five daughters as being males attain twenty-one, or being females attain that age or marry. The interests of the grandchildren in question are, in my judgment, plainly contingent and are subject to the interests defined in the deed of the settlor's four named daughters who were alive at the date of it.

It is also, in my judgment, clear that the forfeiture provisions which I have stated and which are to be found in clause 15 of the deed are, upon the assumption that they are valid, so framed as that if they are fulfilled they will at the moment of fulfilment destroy the respective interests of the grandchildren in a moiety of their interests before such interests vest. The language of clause 15 is, in my judgment, not open to doubt. It contemplates first some event happening before a grandchild attains a vested interest, and then provides that upon the happening of that event the grandchild concerned shall thereupon forfeit and lose one moiety of his or her share right or interest. Such language makes it plain, to my mind, that the settlor contemplated the possibility of the condition being fulfilled during minority with the immediate consequence at the moment of its fulfilment of a forfeiture.

As a matter of construction, therefore, I have come to the conclusion that the provisions for forfeiture of a moiety of the grandchildren's interests contained in clause 15 of the deed poll are conditions subsequent framed to defeat, in part, the grandchildren's contingent interests in the trust premises. As such their validity is, in my judgment, to be determined by the same considerations as apply to conditions subsequent framed to defeat a vested interest: see *Egerton* v. *Earl Brownlow.* (1)

Having reached this conclusion, the next question to be considered is what, upon the true construction of the language of clause 15 of the deed, are the facts and circumstances relating to and surrounding each grandchild which, upon the assumption that the conditions are valid, enable you to predicate of a grandchild that he or she is or has become a Roman Catholic, or that he or she is not openly or avowedly Protestant. A close examination of the language and of the circumstances in which and the ages of the persons to whom the tests have to be applied show at once the difficulties there are in construing the clause. [After stating some of these circumstances and indicating the nature of the

(1) 4 H. L. C. 1.

questions which would arise for the purpose of solving these difficulties, his Lordship continued :] I do not propose to answer these questions, because the view I take of the law makes it unnecessary for me to do so. I will assume that the three defendants concerned have become Roman Catholics, and that the two of them who are now of age became so before they respectively attained vested interests in their shares. The condition is intended to operate during minority, and is to operate because during that period infants either become members of a particular branch of the Christian Church or are not openly or avowedly members of another Church. Infants are, or ought to be, instructed in religious matters by their parents, and as a general rule have no choice of their own in such matters. The parents' duty is to be discharged solely with a view to the moral and spiritual welfare of their children, and ought not to be influenced by mercenary considerations affecting the infant's worldly welfare.

Sheppard in his Touchstone, vol. i., p. 132, lays down the law as regards the validity of conditions in these terms : " All conditions annexed to estates, being compulsory, to compel a man to do any thing that is in its nature good or indifferent ; or being restrictive, to restrain or forbid the doing of any thing which, in its nature, is *malum in se*, as to kill a man, or the like ; or *malum prohibitum*, being a thing forbidden by any statute, or the like; all such conditions are good, and may stand with the estates. But if the matter of the condition tend to provoke or further the doing of some unlawful act, or to restrain or forbid a man the doing of his duty ; the condition for the most part is void."

Parker J. tested the validity of a condition subsequent by those principles in *In re Sandbrook.* (1) The condition for forfeiture in that case was contained in a will and was in these terms : " And I declare that if, at any time on or before the 31st day of December, 1927, either one or both of my grandchildren shall live with or be or continue under the custody, guardianship or control of their father, Doctor T. G. Duncan Cooper, or be in any way directly under his control, all benefits, profits and income provided to be given under this my will to both or either one of them, as the case may be, shall thereby cease and determine, and it shall be at all times and under all circumstances an absolute condition of either one or both of them receiving any income, benefit or legacy under this my will that he or she or both of them shall separately and individually continue to live free from his direct influence and control." With respect to that condition Parker J. made the following observations: " It appears to me that this condition is inserted in the will with the direct object of deterring the father of these two children from performing his parental duties with regard to them, because it makes their worldly welfare dependent on his abstaining from doing what it is certainly his duty to do, namely, to bring his influence to bear and not give up his right to the custody, the control and education of his children; and it seems to me it is also a direct consequence of a condition of this sort that the discretion of the Court with regard to the custody and maintenance of its wards is equally interfered with. If, for example, I myself—these children being now wards—thought it was for their benefit to direct that they should spend the next year or so with their father (who is a medical officer on furlough from the Malay States) at the seaside under his direct control, I should be fettered in exercising the discretion vested in me by the knowledge that, if I exercised it in this way, I might endanger their worldly welfare and cause them to forfeit what has been given them under the will. It appears to me, therefore, that the condition is directly within the principle, as laid down at p. 132 of Sheppard's Touchstone, that a condition is bad which operates to restrain or forbid a man from doing his duty." I propose to apply the principles contained in Sheppard's Touchstone, to which I have referred, to the conditions contained in clause 15 of the deed poll of August 31, 1910. I ask myself would or might the parents of the three defendants concerned have been deterred from discharging or hampered or influenced in discharging their parental duty in regard to the religious instruction they were to give to their children by reason of the condition? I ask myself whether, if I had now to determine what religious instruction the infant Geoffrey Dormer was to receive, I should be fettered in exercising my discretion by the knowledge that if I directed him to be instructed in his father's faith I might endanger his worldly welfare? The answer to both these questions must, I think, be in the affirmative, and from that answer it follows, in my judgment, that the condition is void because it operates to restrain a man from doing his duty.

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(1) [1912] 2 Ch. 471, 476.

In my judgment the condition is also bad in law because of its uncertainty. In his speech in the House of Lords in *Clavering* v. *Ellison* (1) Lord Cranworth, dealing with the validity of conditions subsequent which operate to defeat a vested estate, says as follows: "I consider that, from the earliest times, one of the cardinal rules on the subject has been this: that where a vested estate is to be defeated by a condition on a contingency that is to happen afterwards, that condition must be such that the Court can see from the beginning, precisely and distinctly, upon the happening of what event it was that the preceding vested estate was to determine." There is, in my judgment, no reason for holding that these observations are not applicable to a condition subsequent which operates to destroy a contingent interest.

Again I ask myself, was it possible for a Court on August 31, 1910, to see precisely and distinctly what facts and circumstances would make it possible to say of an infant affected by the condition that he had either become a Roman Catholic or was not openly and avowedly Protestant? I answer that question in the negative. I do not think anybody could have said at that date what they were, and I do not think that any two people would have agreed as to what they were, and so, as I have said, I hold the condition bad in law on the ground of uncertainty.

(1) 7 H. L. C. 707, 725.

BENNETT J.
1933
BORWICK, *In re.*
BORWICK *v.* BORWICK.

I express no opinion at all on the other questions dealt with before me. Accordingly I answer the third question of the summons by saying that the capital and income of the three defendants in question are not cut down by virtue of the provisions of clause 15 of the settlement.

Solicitors: *Charles Russell & Co.; Beckingsales & Naylors; Travers-Smith, Braithwaite & Co.; Guscotte, Wadham, Tickell & Co.; Withers & Co.; Park Nelson & Co.; May, May & Deacon.*

J. L. D.

llowed. Re BIDIE (*decd.*). [1948] All E.R. 885.

Followed. Re BIDIE, DECD. [1948] Ch. 697

In re HEDDERWICK.

MORTON *v.* BRINSLEY.

[1932. H. 3429.]

LUXMOORE J.
1933
Jan. 24, 25; *March* 23.

Divorce—Alimony pendente lite—Adultery of Wife Petitioner proved—Death of Husband—Wife not entitled to Payment of Arrears of Alimony out of Husband's Estate—Matrimonial Causes Act, 1857 (20 *&* 21 *Vict. c.* 85), *ss.* 17, 22, 52*—Debtors Act,* 1869 (32 *&* 33 *Vict.* c. 62), *s.* 5.

A wife in her petition for divorce admitted certain acts of adultery as to which she asked the Court to exercise its discretion, and an order was made for alimony pendente lite. The King's Proctor intervened, and on the hearing the Court found that the wife had committed adultery on other occasions, but no order was made on the petition. The husband ceased to pay alimony at the end of May, 1930, and the intervention was heard on November 12, 1930. The husband died on April 30, 1932, and his executors stated that his estate was insolvent. The wife claimed to be paid the arrears of alimony out of the estate if solvent, or to prove for them if it was insolvent:—

Held, following *Linton* v. *Linton* (1885) 15 Q. B. D. 239, that the only means by which a wife can enforce payment of arrears of alimony is under s. 5 of the Debtors Act, 1869, and that that remedy ceased on the death of the husband.

Held also that in any event the wife's right to alimony ceased on November 12, 1930, when her further adultery was proved.

Dunn v. *Dunn* (1888) 13 P. D. 91 followed.

In re Stillwell [1916] 1 Ch. 365 not followed.

ADJOURNED SUMMONS.

The following statement of facts is taken from the judgment:—

"The plaintiff is one of the legal personal representatives of the late Norman Stanley Hedderwick. The defendant

LUXMOORE J.
1933
HEDDERWICK, *In re.*
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Vera Maud Brinsley is the other legal personal representative. She is entitled under the testator's will to the whole of his residuary real and personal estate. The defendant Cordelia Edna Hedderwick is the testator's widow.

On February 26, 1929, the defendant Cordelia Edna Hedderwick filed a petition for dissolution of her marriage with the testator. On June 28, 1929, before that petition was heard, the President of the Divorce Division made an order that the testator should pay to the defendant Cordelia Edna Hedderwick alimony pendente lite at the rate of 300*l.* per annum free of tax. On August 1, 1930, the King's Proctor intervened in the divorce proceedings upon a plea that the defendant Cordelia Edna Hedderwick had been guilty of adultery otherwise than as disclosed in her petition. I should state that in her petition she had confessed to certain acts of adultery, and asked the Court for the exercise of its discretion in her favour.

By an order made on November 12, 1930, the intervention of the King's Proctor was allowed, i.e., it was established that the defendant Cordelia Edna Hedderwick had been guilty of adultery as alleged. No order of any kind was made on the petition for divorce, and such petition remained on the file. The testator paid alimony to the defendant Cordelia Edna Hedderwick down to the end of May, 1930, but no payments were made after that date. The testator by his will dated April 28, 1932, appointed the plaintiff and the defendant Vera Maud Brinsley to be his executors, and devised and bequeathed all his real and personal estate, including any property in respect of which he had a general power of appointment, to his sister, the defendant Vera Maud Brinsley, absolutely. The testator died on April 30, 1932, and his will was proved on June 17, 1932, by the two executors.

The testator's estate is said to be insolvent, but this fact is not admitted by the defendant Cordelia Edna Hedderwick.

This summons was taken out on September 6, 1932, by the plaintiff, asking the Court to determine whether the executors of the testator ought to admit, either in whole or in part, the proof of the defendant Cordelia Edna Hedderwick for arrears of alimony pendente lite under the order of June 28, 1932.

The defendant Cordelia Edna Hedderwick claims to be entitled as against the testator's estate to recover or prove for arrears of alimony from the end of May, 1930, down to the date of the testator's death.

The defendant Vera Maud Brinsley as sole residuary legatee claims first that no arrears of alimony are provable against the testator's estate, whether it be solvent or insolvent. She further claims that, if this contention is wrong and the defendant Cordelia Edna Hedderwick has a legal right either to recover or prove for arrears of alimony, the order of June 28, 1929, ceased to have any effect as from November 12, 1930, the date when the intervention of the King's Proctor was allowed. This contention is based on the ground that a husband, ordered to pay alimony to his wife, is freed from any liability to do so from the moment it is established by the order of the Court that the wife has been guilty of adultery. If this is correct the only arrears available are for the period between the end of May, 1930, and November 12, 1930. The defendant Vera Maud Brinsley further contends that the arrears for the last mentioned period cannot either be recovered or the subject of proof, because they relate to a period more than one year earlier than the testator's death."

E. W. Lavington for the plaintiff.

E. J. T. G. Bagshawe for the defendant Mrs. Brinsley. I submit that Mrs. Hedderwick's claim against the testator's estate ought to be rejected. By the finding of the Court that she had committed adultery beyond that which she had admitted she has lost her right to alimony: *Dunn* v. *Dunn* (1), where Lindley L.J. lays it down that the right ceases on the proof of adultery. The order for alimony was made on the footing that she had only committed adultery on the two admitted occasions. In *Whitmore* v. *Whitmore* (2) it was held that a

(1) 13 P. D. 91.

(2) (1866) L. R. 1 P. & M. 96.

wife was entitled to alimony up to the time when adultery by her was proved but that then it ceased, and the same was held in *Wells* v. *Wells.* (1) In *Wright* (*H. S.*) *& Webb* v. *Annandale* (2) it was held that after the wife's adultery was proved the husband was not liable for her costs. As to the second point, I submit that a wife cannot prove for alimony in the husband's bankruptcy. Under Sch. I., Part I., of the Administration of Estates Act, 1925, an insolvent estate is to be administered as in bankruptcy, and the bankruptcy rules are to be incorporated in such administration. She can recover no arrears of alimony in the administration : *Kerr* v. *Kerr.* (3)

In any event the Court will not order more than payment of one year's arrears, and a year had not elapsed between the cessation of payment and the proof of adultery.

E. M. Winterbotham for the defendant Mrs. Hedderwick. It may be that alimony pendente lite ceases automatically on a decree nisi, but the Court can give alimony after a decree if it thinks fit. Neither *Dunn* v. *Dunn* (4) nor *Wells* v. *Wells* (1) says that alimony cannot be granted after decree. In *Ellis* v. *Ellis* (5) it was held that the Court could grant alimony after a decree nisi had been made. In *Jones* v. *Jones* (6) it was held that alimony could be granted pending an appeal. See also *Welton* v. *Welton.* (7)

I submit that arrears of alimony are recoverable against the estate. None of the cases in bankruptcy refer to the case of a dead man. See Bankruptcy Act, 1914, s. 30.

There is a different rule in the administration of a solvent and insolvent estate. There is no proof here that the estate is insolvent. In *In re Stillwell* (3) Sargant J. held that a wife can recover arrears of alimony from a solvent estate of her deceased husband. The amount of time for which arrears of alimony can be recovered is not limited to one year but is in the discretion of the judge : *Campbell* v. *Campbell.* (9)

(1) (1864) 10 L. T. 696.
(2) [1930] 2 K. B. 8.
(3) [1897] 2 Q. B. 439.
(4) 13 P. D. 91.
(5) (1883) 8 P. D. 188.
(6) (1872) L. R. 2 P. & M. 333.
(7) [1927] P. 162.
(8) [1916] 1 Ch. 365.
(9) [1922] P. 187.

There is no arbitrary rule. It may be that during the husband's life the amount of alimony cannot be assessed, and so the arrears cannot be proved for in bankruptcy. The Divorce Court can vary the amount, and that is what the cases go on; but on the husband's death the jurisdiction of the Divorce Court ceases, and so the amount of alimony due can be assessed and proved for: see *Linton* v. *Linton*. (1) The question of assessment is the only reason why arrears cannot be proved for, as even if you had proved the wife could go back to the Divorce Court and get new alimony.

Bagshawe in reply. *Kerr* v. *Kerr* (2) shows that only one year's arrears can be recovered. The rule as to the proof of alimony in an insolvent estate was in existence before the Administration of Estates Act, 1925, came into force.

Cur. adv. vult.

March 23. LUXMOORE J. [after stating the facts as hereinbefore set out, continued :] The nature of the obligation of a husband to pay alimony to his wife under an order of the Divorce Court has frequently been considered. It was pointed out by Lord Esher (then Brett M.R.) in *Bailey* v. *Bailey* (3) : " In a Court of Common Law no right to alimony existed : at all events, the power to make an order did not by the common law exist in the Court of Divorce, because that Court was created by the legislature, when it passed [the Act] 20 & 21 Vict. c. 85," i.e., the Matrimonial Causes Act, 1857.

The last mentioned Act empowered the Divorce Court to order alimony to be paid by a man to his wife in cases where the wife was applying for restitution of conjugal rights or for judicial separation, and also in cases where the Ecclesiastical Courts would have given that relief : see ss. 17 and 22 of the Act.

Sect. 52 of the same Act provides the remedy for disobedience to the decrees and orders to be made by the Divorce Court in the following terms : " All decrees and orders to be made by the Court in any suit, proceeding, or petition to be instituted under authority of this Act, shall be enforced and put in execution in the same or the like manner as the judgments, orders, and decrees of the High Court of Chancery may be now enforced and put in execution." From this it appears that an order of the Divorce Court for payment of alimony did not create a legal debt enforceable at common law, but merely a liability enforceable solely in the manner provided by the statute.

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(1) 15 Q. B. D. 239.
(2) [1897] 2 Q. B. 439.
(3) (1884) 13 Q. B. D. 855, 859.

This position was made quite clear by the judgment of the Court of Appeal in *Linton* v. *Linton.* (1) In that case the Divorce Court had under s. 1 of the Matrimonial Causes Act, 1866, made an order for the payment by a husband to his wife of permanent maintenance as part of an order for judicial separation. The husband filed his petition in bankruptcy, and claimed that his adjudication thereunder operated to absolve him from future liability to pay the maintenance. The Court of Appeal held that the order for payment of maintenance remained effective and was not affected by the bankruptcy. Bowen L.J. pointed out in his judgment that arrears of alimony are, within the meaning of s. 5 of the Debtors Act, 1869, a debt due in pursuance of an order or judgment of a competent Court. He said (1): "Before that"—i.e., before the Debtors Act was passed—"the payment of alimony was enforced by proceedings for attachment under the provisions of s. 52 of the Matrimonial Causes Act, 1857. Since the Debtors Act was passed the proceeding by attachment has fallen into disuse, and, unless the payment of alimony can be enforced under s. 5 of the Debtors Act, there seems to be no way of enforcing it. I think it is not too wide a construction to say that arrears of alimony are a debt within s. 5, though they do not constitute a debt at law."

Consideration of the cases leads to the conclusion that alimony is a judicial assessment of the husband's obligation to maintain his wife. It is inalienable and unassignable: it cannot be affected by agreement between the parties or by

(1) 15 Q. B. D. 239, 246.

the bankruptcy of the husband. Further, it cannot be sued for at law. The order for its payment is not final or conclusive, even in the Divorce Court. It remains subject to the control of the Court, which may vary it from time to time, and there is complete discretion as to arrears: see in addition to the cases already cited *In re Hawkins. Ex parte Hawkins* (1); *Kerr* v. *Kerr* (2); and *Robins v. Robins.* (3)

The authorities to which I have referred make it clear that the only means of enforcing an order for alimony against a husband who refuses to pay it is under the Debtors Act. In *In re Stillwell* (4) Sargant J. held that a widow was entitled to recover against her deceased husband's estate, if it was solvent, arrears of alimony due at his death. I am unable to reconcile this decision with those to which I have already referred. Sargant J., after referring to some of those decisions and stating—if I may respectfully say so—their effect with precision, says this: " But because the Court to deal with the order during the husband's lifetime is the Divorce Court, that is, in my judgment, no reason for holding that arrears cannot be enforced as a debt after the jurisdiction of that Court has come to an end by reason of the husband's death." With the greatest possible deference it seems to me that this statement assumes that an order for alimony or maintenance created a legal debt. In my reading of the cases the order for alimony does not create a legal debt, but a liability to pay which can only be enforced in one way, i.e., by attachment under the Debtors Act. Obviously that remedy ceases to be available on the death of the husband. It is difficult to understand how the cesser of the only remedy could change the nature of the liability, and convert into a debt legally enforceable that which had not that characteristic during the husband's lifetime. With all possible respect for the learned judge, I think that his judgment is contrary to the decisions to which I have referred, and that I am not only not bound by it, but that I should be deciding contrary to decisions which are binding upon me if I decided to follow

(1) [1894] 1 Q. B. 25.
(2) [1897] 2 Q. B. 439.
(3) [1907] 2 K. B. 13.
(4) [1916] 1 Ch. 365, 368.

it. Sargant J. in his judgment limited the wife's right to recover to the arrears for one year only, apparently in recognition of the practice of the Divorce Court not to enforce payment of arrears due in respect of any longer period. It is difficult to understand how this limitation can be justified if the liability has in fact become a debt legally enforceable.

In my judgment the order for alimony, assuming it was enforceable during the testator's lifetime, ceased to be so upon his death, and consequently the defendant Cordelia Edna Hedderwick is not entitled to recover anything in respect of it against the testator's estate. Further, I am of opinion that this is the position whether the estate is solvent or insolvent.

In the circumstances it is unnecessary to determine any further question, but, since the case may go elsewhere, I think it would be convenient that I should deal with the question whether the order for alimony ceased to operate on November 12, 1930, by reason of the finding on which the order of that date was based, that the defendant Cordelia Edna Hedderwick had been guilty of adultery. It was decided in *Dunn* v. *Dunn* (1) that, where alimony pendente lite has been allotted to a wife in a petition for divorce, such alimony ceases upon a verdict finding her guilty of adultery, but the Court may in its discretion make an order for the alimony to continue. Cotton L.J. in that case said: "Until adultery has been proved against the wife she is entitled to support, and the Court gives her alimony pendente lite." The Court in that case was dealing with a wife against whom adultery was alleged. Cotton L.J. continued: "But when her adultery has been proved, though she is still a wife, she has lost that right. . . . . The reasonable rule then appears to be that, on the jury finding the wife guilty of adultery her right to alimony ceases, subject to this, that if the judge thinks it reasonable so to do he can continue it." That is if the wife is appealing from the verdict or applying for a new trial.

In the present case the wife was the petitioner in the divorce proceedings; she had in her petition admitted that she had been guilty of adultery in certain specific cases: the King's Proctor by his intervention established that she had been guilty of adultery in other cases. On this fact being established the order for alimony pendente lite, which had been made with knowledge of the admitted adultery, was no longer applicable, and the husband, on the principle enunciated in *Dunn* v. *Dunn* (1), was entitled to refuse to make any payments under the order of June 28, 1929, in respect of any period after November 12, 1930. The wife could of course have applied for the continuation of the alimony notwithstanding the order, but the onus was on her to satisfy the Court and obtain an order for such continuance. The defendant took no step to this end. In my judgment the alimony ceased as from November 12, 1930.

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(1) 13 P. D. 91, 93.

In the result I hold that the defendant Cordelia Edna Hedderwick is not entitled to receive from or prove against the testator's estate, whether solvent or insolvent, for any part of the arrears of alimony under the order of June 28, 1930.

Solicitors: *Farman, Daniell & Co.*; *Whites & Co.*

(1) 13 P. D. 91, 93.

E. K. C.

LORD TOMLIN.*

1933

March 16.

In re H. J. OGDEN.

BRYDON *v.* SAMUEL.

[1932. O. 2551.]

Will—Bequest to political Bodies having as their Objects "the promotion of Liberal principles in politics"—Not void for Uncertainty—No Trust created—Valid Bequest.

A testator by his will bequeathed 4 per cent. of his residuary estate to H. S. " to be by him distributed amongst such political federations or bodies in the United Kingdom having as their objects or one of their objects the promotion of Liberal principles in politics as he shall in his absolute discretion select and in such shares and proportions as he shall in the like discretion think fit."

H. S. stated that he was able to ascertain all the bodies in the United Kingdom that fell within the description of the bequest:—

Held, that no question of a charitable bequest arose; that there was a class of beneficiaries capable of ascertainment in a specified area; that the bequest was not void for uncertainty; that there was no trust for the promotion of Liberal principles; and that the bequest was valid.

Speech of Lord Atkinson in *Houston* v. *Burns* [1918] A. C. 337, 345, applied.

ADJOURNED SUMMONS.

This summons raised the question whether a bequest to political federations or associations or bodies having as their objects the promotion of Liberal principles in politics was void for uncertainty or as creating an illegal trust.

Mr. Henry Joseph Ogden by his will dated November 30, 1928, appointed Ethelbert Claude Brydon, Arthur Ogden, and the Public Trustee executors and trustees thereof and devised and bequeathed all his real and personal estate unto his trustees upon trust for sale and conversion and directed his trustees out of the proceeds of such sale and conversion to pay his funeral and testamentary expenses and debts and to pay or provide for certain legacies and annuities and the death duties thereon. He gave and bequeathed the ultimate residue of the proceeds of sale " to the institutions societies associations and persons next hereinafter named and in the proportions prefixed to the name of each as percentages of the whole." The will then specified twenty-four institutions or societies or persons, among which were the Manchester Royal Infirmary and Hospital and four specified Liberal Associations.

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* Sitting as additional judge of the Chancery Division.

The last bequest was in the following terms: "Four per cent. to the Right Honourable Sir Herbert Samuel to be by him distributed amongst such political federations or associations or bodies in the United Kingdom (other than the four Liberal Associations lastly hereinbefore mentioned) having as their objects or one of their objects the promotion of Liberal principles in politics as he shall in his absolute discretion select, and in such shares and proportions as he shall in the like discretion think fit. The receipt of the said Sir Herbert Samuel to be a good discharge to my trustees."

The testator made three codicils to his will by which he gave certain further legacies, but none of such codicils affected the disposition of his residuary estate. The testator died on April 6, 1932, and his will with the said three codicils thereto was duly proved in the Principal Probate Registry on May 21, 1932.

The testator's estate had been duly administered, and the value of the residuary estate was about 100,000*l.* to be divided between the institutions societies associations and persons mentioned in the residuary bequest. Questions, however, arose as to the validity of the bequest to Sir Herbert Samuel, it being suggested that it was invalid, either for uncertainty of the objects, or as creating an illegal trust.

The trustees therefore issued this summons on November 10, 1932, making defendants Sir Herbert Samuel, Mrs. Clara Elizabeth Gordon, one of the next of kin, to represent the next of kin, the Manchester Royal Infirmary and Hospital, to represent the other institutions mentioned, and the Attorney-General. Sir Herbert Samuel in his affidavit stated that he would have no difficulty in identifying the bodies to whom the words of the bequest were applicable.

A. J. Belsham for the trustees.

Norman Daynes K.C. and *H. Lloyd Williams* for Sir Herbert Samuel. It is unnecessary to consider whether or not the bequest is charitable, as no question of perpetuity can arise. It is an absolute gift to the Associations which Sir Herbert Samuel may select. There is no uncertainty, as Sir Herbert Samuel knows or can ascertain all the Associations in the United Kingdom whose objects are the promotion of Liberal principles. Nor is there any uncertainty in the question of Liberal principles, and the case does not fall within the decisions in *Houston* v. *Burns* (1); *Attorney-General* v. *National Provincial Bank* (2); and *Grimond* (*or MacIntyre*) v. *Grimond* (3), in which it was held that bequests for public or political purposes were void for uncertainty. No question of trust arises. There is an absolute gift to the selected bodies, and the reference to Liberal principles is only for the purpose of identification.

Stafford Crossman for the Attorney-General did not claim that any question of charity arose, as there was an absolute immediate gift.

C. R. D. Richmount for the next of kin. I submit that the bequest is void for uncertainty. The selected institutions would take subject to a trust for the promotion of Liberal principles, and as the objects are not charitable the bequest must be void. Such a trust would be illegal: see *Bowman* v. *Secular Society, Ld.* (4); Tudor on Charitable Trusts, 5th ed., p. 119. In *Bowman* v. *Secular Society, Ld.* (4), there was an incorporated body which could take the gifts, and no purpose was specified to which the gift was to be applied. If an institution receives money it receives it for the purposes of the institution, and that implies a trust. It is clear that the testator did not intend to give the money to the individuals constituting the Association but for the purpose of promoting Liberal principles. The words "federations or associations or bodies" are disjunctive, and it is impossible for Sir Herbert Samuel to say that he knows all of these, and that he can select from all the possible objects a gift for promoting politics is bad.

(1) [1918] A. C. 337, 345.

(2) [1924] A. C. 262.

(3) [1905] A. C. 124.

(4) [1917] A. C. 406, 442.

Herbert Hart (*Wilfrid Hunt* with him) for the Manchester Royal Infirmary and Hospital associated himself with the arguments of Mr. Richmount.

Norman Daynes K.C. in reply. The institutions to be benefited are limited by the words "promotion of Liberal principles in politics" and can be easily ascertained. A gift to a body to be applied according to its rules for certain purposes does not imply any trust for those purposes. It is an absolute gift to the bodies, and such an absolute gift was held to be valid in *Bowman* v. *Secular Society, Ld.* (1)

LORD TOMLIN. The only question which calls for a decision in this case is the effect of a gift in clause 7 of the will of a testator who left his residue to "the institutions societies and persons next hereinafter named." Then there follows a long list of institutions with a percentage attached to each name. Some of these institutions are obviously charities, and others are obviously not. The last item in the list is in these terms [His Lordship then read the bequest to Sir Herbert Samuel, and continued :] It is with this last item that I am concerned.

Now, this case has been argued upon the assumption that for the moment it is not necessary to consider whether or not such a gift as is contained in the item in question is good as a charitable gift, and the view which I am about to state is expressed upon the assumption that there is no question of charity in the case. The question propounded is, whether upon the footing that the gift is not charitable it is bad for uncertainty, or upon the ground that it is subject to a trust that is invalid.

Now, I do not think that it is in dispute that a gift to a corporation, or a voluntary association of persons, for the general purposes of such corporation or association is an absolute gift, and prima facie is a good gift, and, as no question of perpetuity can be involved in such a case, it becomes unnecessary to consider whether the gift is charitable or not. The validity of the gift does not depend upon its being charitable, but upon its being an absolute gift. The principle was indicated by Lord Parker in *Bowman* v. *Secular Society, Ld.* (1), where he says: "The abolition of religious tests, the disestablishment of the Church, the secularisation of education, the alteration of the law touching religion, or marriage, or the observation of the Sabbath, are purely political objects. Equity has always refused to recognise such objects as charitable. It is true that a gift to an association formed for their attainment may, if the association be unincorporated, be upheld as an absolute gift to its members, or, if the association be incorporated, as an absolute gift to the corporate body; but a trust for the attainment of political objects has always been held invalid, not because it is illegal, for every one is at liberty to advocate or promote by any lawful means a change in the law, but because the Court has no means of judging whether a proposed change in the law will or will not be for the public benefit, and therefore cannot say that a gift to secure the change is a charitable gift."

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(1) [1917] A. C. 406.

Now, applying these principles to this case, and leaving out of account the question whether there is an illegal trust, all that I have to consider is, whether there is such uncertainty in the field of selection that it is impossible for the selector to determine from which institutions he is to select. If so, the bequest is bad on the ground of uncertainty. The question is one of degree in each case, whether, having regard to the language of the will, and the circumstances of the case, there is such uncertainty as to justify the Court in coming to the conclusion that the gift is bad. Now, it is to be observed that in the present case the field of selection is: "Political federations or associations or bodies in the United Kingdom, having as their objects or one of their objects the promotion of Liberal principles."

I have the evidence of Sir Herbert Samuel, who has referred to a number of bodies which come within the description, and who states that, in fact, he can ascertain by inquiry all the bodies that can come within that description, and I take the view that upon that evidence, and the language of the will, and having regard to the principles laid down from time to time, there is certainty here in the field of selection. It comes within the words of Lord Atkinson in *Houston* v. *Burns* (1): "I do not think that this case has the slightest resemblance to those in which property is vested in trustees to be applied for the support or benefit of such institutions of a particular class as may be in existence, or in the course of creation, in any given town or area at the time at which the will speaks. There is no vagueness or uncertainty in such cases at all."

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(1) [1917] A. C. 406, 442.

Now, it seems to me that here you have a class capable of ascertainment, and in a specified area, and in my view the bequest is not void on the ground that the field is too vague. I hold that the gift is not void for uncertainty.

There remains the argument that there is some illegal trust attached to the subject-matter of the gift. Here, if there be a trust, it must be found in the language of the will. I am unable in the express language which the testator has employed to find any trust, and there is nothing to justify the implication of one. Mr. Richmount has suggested that there is a trust for the promotion of Liberal principles. The reference to Liberal principles is a reference to the characteristic by which those in the field of selection are to be identified. I can find no trust at all.

Consequently I hold that, when the bodies have been selected from the prescribed field, the gift to each body will be an absolute gift for the purposes of such body, and accordingly valid.

Solicitors: *Radford, Frankland & Mercer; Gilbert Samuel & Co.; Gregory, Rowcliffe & Co., for Parkinson, Slack & Needham, Manchester; Treasury Solicitor.*

(1) [1918] A. C. 337, 345.

E. K. C.

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FARWELL J.
Oct. 26, 27.
C. A.
1933
Feb. 14, 16;
March 17.

In re SOCIÉTÉ INTERCOMMUNALE BELGE D'ÉLECTRICITÉ.

FEIST *v.* THE COMPANY.

[1932. S. 2555.]

Company—Foreign Company—Bonds—Principal and Interest made payable "in sterling in gold coin of the United Kingdom of or equal to the standard of weight and fineness existing on" *September* 1, 1928—*Principal and Interest payable in Bank-notes as being legal Tender—Bank of England Act*, 1833 (3 & 4 *Will.* 4, *c.* 98), *s.* 6—*Coinage Act*, 1870 (33 *Vict. c.* 10), *ss.* 3, 4, 6—*Currency and Bank Notes Act*, 1928 (18 & 19 *Geo.* 5, *c.* 13), *s.* 1.

The plaintiff was the holder of a 100*l.* bond, part of a series of bonds issued in 1928 by the defendants, a Belgian company. Each bond provided for payment of 100*l.* on September 1, 1963, or such earlier day as the principal moneys thereby secured became payable under the indorsed conditions, and of interest during the continuance of the security at 5½ per cent. per annum "in sterling in gold coin of the United Kingdom of or equal to the standard of weight and fineness existing on the 1st day of September, 1928." Condition 18 of the bond provided that the bond should be "construed and the rights of the parties regulated according to the law of England and as a contract made and according to the terms thereof to be performed in England":—

Held (affirming Farwell J.'s decision), (1.) that the bond was not a contract for delivery of bullion but imposed an obligation to pay a debt with interest; (2.) that the provision for payment in gold coin of the specified weight and fineness did not fix the measure of the company's liability but the mode in which the indebtedness was to be discharged; and (3.) that as bank-notes were made legal tender by the combined effect of the Bank of England Act, 1833, and the Currency and Bank Notes Act, 1928, s. 1, sub-s. 2, that indebtedness could by virtue of the Coinage Act, 1870, s. 6, be satisfied in bank-notes.

Per Lawrence L.J.: "A contract that a debt shall be discharged by payment in gold coins (being one form of legal tender) cannot abrogate the enactment by the Legislature that the debt may be discharged by payment in bank-notes (being another form of legal tender)."

Per Romer L.J.: In so far as the provision for payment by the company of principal and interest "in gold coin of the United Kingdom of or equal to the standard of weight and fineness existing on the 1st day of September, 1928" debars the company from paying any part of the principal and interest in silver or bronze coins, it is not permitted by the Coinage Act, 1870, s. 6, and the bond must therefore be treated as though these words were excluded.

Adjourned Summons.

The plaintiff was the holder of a bearer bond for 100*l.*, part of an amount of 500,000*l.* offered for sale by the defendant company on September 25, 1928. The company was a limited liability company, incorporated under Belgian law and having its head office in Brussels.

The bond contained the following provisions: 1. The company "will, on the 1st day of September, 1963, or on such earlier day as the principal moneys hereby secured become payable in accordance with the conditions endorsed hereon, pay to the bearer . . . . on presentation of this Bond the sum of 100*l.* in sterling in gold coin of the United Kingdom of or equal to the standard of weight and fineness existing on the 1st day of September, 1928." 2. "The company will, during the continuance of this security, pay . . . . interest thereon at the rate of 5½ per cent. per annum in sterling in gold coin of the United Kingdom of or equal to the standard of weight and fineness existing on the 1st day of September, 1928, by equal half-yearly payments on every 1st day of March and 1st day of September, in accordance with the coupons annexed hereto." 3. "The principal of and interest on this Bond are payable without deduction or diminution for any taxes, assessments, charges or duties of any kind whatsoever, past, present or future, that may be levied or imposed by the Kingdom of Belgium, or by any Province, Commune, Municipality, or other Taxing Authority therein or thereof." 4. This Bond is one of an authorised issue of Bonds of the company of an aggregate principal amount not exceeding 500,000*l.* in sterling in gold coin of the United Kingdom at any one time outstanding." 5. "This Bond is issued subject to and with the benefit of the conditions endorsed hereon, which are to be part of it." Condition 6 of the conditions endorsed thereon provided that "The Bonds of this issue shall constitute and they and each of them hereby are declared to be the direct and unconditional liability and obligations of the company in sterling in gold coin of the United Kingdom in accordance with the provisions of the Bonds and these conditions." Condition 18 (1.) provided

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that "This Bond shall be construed and the rights of parties regulated according to the law of England and as a contract made and according to the terms thereof to be performed in England and the parties submit to the jurisdiction of the English Courts and elect an English domicile." The Bond had printed across it: "Thirty-Five Year Sinking Fund $5\frac{1}{2}$ per cent. Sterling Bond. Due 1st September, 1963." Then in large type appeared the words "Bond for One Hundred Pounds" and in each top corner "100*l*." Each coupon, after stating the name and address of the company, is in these terms: "Thirty-five year sinking fund $5\frac{1}{2}$ per cent. Sterling Bond due September 1st, 1963. Bond for 100*l*., Number . . . . Coupon No. . . . . 2*l*. 15*s*. 0*d*. Coupon for 2*l*. 15*s*. 0*d*. being half-year's interest due on the . . . . and payable in accordance with the conditions endorsed hereon, at the registered office of M. Samuel & Co., Limited, in London, England, the fiscal agent of the company (or at the principal office of any successor fiscal agent) less British income tax."

Disputes arose between the company and the plaintiff and other holders of the bonds as to the rights of holders to payment of interest and principal, the company contending that it was entitled to pay the interest and principal in whatever might be legal tender in England at the time of payment for the nominal amount of the pounds and shillings denominated by the bond. Eventually the plaintiff issued this summons under Order LIV.A asking for (1.) "A declaration that upon the true construction of the said Bond the defendants thereby warrant or guarantee to the plaintiff, as holder of such Bond, that they will discharge their obligations thereunder by tendering him in payment of the principal and interest due upon such Bond, at the times specified therein, gold coin of the United Kingdom to the appropriate amount of or equal to the weight and fineness existing on 1st September, 1928"; (2.) "Alternatively, a declaration that upon the true construction of the said Bond the defendants are bound to pay to the plaintiff as holder thereof in discharge of the principal and interest from time to time due upon such Bond at the times therein specified such a sum in sterling as may be sufficient to purchase in the market on the day of payment gold of not less weight and fineness than that contained in the gold coin of the United Kingdom which would have sufficed to discharge such payment if falling due on 1st September, 1928."

Lionel Cohen K.C. and *Cyril Radcliffe* for the plaintiff.

Gavin Simonds K.C. and *H. S. G. Buckmaster* for the defendant company.

Farwell J. This summons raises a very difficult question which I have to determine. The bond in question has to be carefully scrutinized, because the question to be determined is primarily one of construction of that document. The first matter to be noticed in the bond is that by virtue of condition 18 this document is to be construed in accordance with English law and effect must be given to it according to that law, and I am not therefore concerned in any way with any other law than the law of this kingdom.

The question which has arisen and which I am asked to determine is in what way can the company discharge its obligations under the bond. The plaintiff in issuing his summons has formulated, in the form of declarations which he asks the Court to make, two possible ways in which he says this bond ought to be construed; he asks in the first place for [His Lordship read questions 1 (*a*) and 2 of the summons, and continued :] The plaintiffs at the Bar elected, as they were entitled to do, to put forward as their first line of attack the second of those two declarations as being primarily the proper construction to be put upon the document. I, of course, do not attach any weight to the fact that in the originating summons itself that declaration is the second and not first declaration which is asked.

That this document raises a difficult question of construction is, I think, clear on the face of it. When one looks at the document without closely examining the actual wording, the first thing that strikes one is that it is a bond to secure the payment of the sum of 100*l.* and the interest payable thereon. That would appear to be manifest on the face of the document. The words "Bond for One hundred pounds" in large letters is printed across the middle of the document. There is impressed on the document itself, superimposed as it were upon the smaller lettering, the figures 100*l.*, and there is in each corner of the document the same figures. I cannot doubt that any one looking at this document, without close examination of it, would say at once: Here is a bond to secure the payment of 100*l.* and interest thereon; and if that were all that this document provided there could be no question that the obligation of the company would be discharged when it paid 100*l.*, or tendered 100*l.* in whatever was legal tender at the time when the tender was made. That is clearly shown by s. 6 of the Coinage Act of 1870 (33 Vict. c. 10). That section provides: "Every contract, sale, payment, bill, note, instrument, and security for money, and every transaction, dealing, matter, and thing whatever relating to money, or involving the payment of or the liability to pay any money, which is made, executed, or entered into, done or had, shall be made, executed, entered into, done and had according to the coins which are current and legal tender in pursuance of this Act, and not otherwise, unless the same be made, executed, entered into, done or had according to the currency of some British possession or some foreign state." In the same way, with regard to the coupons, the obligation thereunder would be discharged by paying 2*l.* 15*s.* at the appropriate dates in whatever was legal tender. When, however, the actual language of the document is more closely examined, there emerges at once the question whether that is the true construction of it. The actual words used in the body of the document would appear not to be consistent with the prima facie construction—namely, that it is a mere obligation to pay a debt of 100*l.* and interest, because the bond provides that the defendant company shall pay the sum of 100*l.* in sterling in gold coins of the United Kingdom of or equal to the standard of weight and fineness existing on September 1, 1928, and the same words are used when the bond deals with the payment of the coupons; the amount of the coupon is to be paid in sterling in gold coins of the United Kingdom of or equal to the standard of weight and fineness existing on September 1, 1928. It is obvious that these words give rise to a serious difficulty. There are, as I have said, two possible constructions put forward by the plaintiff.

The way in which they put the first alternative is this. They say: this is not a covenant to pay 100*l.*; it is a covenant to pay such a sum as represents 100*l.* measured in the value as to weight and fineness of the golden sovereign on September 1, 1928. Now it is quite plain that if that is the true construction of this document, the obligation upon the defendant company to pay may be greatly in excess of 100*l.*, treating 100*l.* as meaning 100*l.* payable in legal tender. The value of gold has increased, and to pay an amount which represents the value of 100*l.* measured by the value of the fineness and weight of the sovereign on September 1, 1928, at the present time will involve a payment of considerably more than 100*l.* That being so, I am faced with this dilemma: either I must give some meaning other than its proper meaning to the words "One hundred pounds," or I must give no effect to the last part of the first paragraph of the bond itself. It does not seem to me, and I have not heard any argument which convinces me, that I can make the meaning of the words used in the bond consistent whichever way I read them. As I have pointed out, if I adopt the plaintiff's argument, then I disregard the primary meaning of the words "One hundred pounds"; on the other hand, if I hold that this is merely a bond to secure payment of 100*l.* and no more, then I would appear to be giving no weight to and putting no meaning upon the latter part of that clause.

My attention has been called to a judgment in a case which came before the Permanent Court of International Justice in which very similar questions arose, which were debated at considerable length and were finally determined by the Court in accordance with the contentions of the

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plaintiff in this case. Those judgments are judgments to which I must pay every respect, but they are not in any sense binding upon me, and although they may offer me assistance in showing the way in which the learned judges of that Court came to the conclusion which they did, they are not, as I have said, in any sense binding upon me, and if in this case I come to a conclusion different to that expressed by that Court, I am bound to give effect to it. I have to construe this bond in accordance with the principles of construction which obtain in this country, because this contract is governed by English law. Now there are two elementary principles of construction which appear to be applicable here; in the first place, the words used must be given, if possible, their primary meaning—that is to say, the words used must be taken to mean what they do mean in their natural meaning, unless there is some reason apparent in the document itself which obliges the Court to put some other meaning upon them; secondly, the Court in construing the document is not entitled to disregard any part of it or give no effect to any part of it, unless, again, it is not reasonably possible to construe the document without so doing. I am, therefore, in the dilemma which I have already stated: either I must put a construction other than its proper and primary meaning to some of the words in the document, or I must give little or no weight to other words. What is the true construction? It is, in my judgment, extremely difficult to read this bond as meaning throughout an obligation to pay some sum which is not, in fact, 100*l*. The amount which would be payable in 1963, if the bond is not paid off before that date, is an amount which is now unascertainable, and therefore the obligation, if the construction which the plaintiff would like to put upon this document is the right one, is not an obligation to pay 100*l* at all, but is an obligation to pay an unascertained sum, a sum which will be ascertainable at the due date, but a presently unascertained sum which will have to be calculated or ascertained when the date of payment arrives. Equally the coupons are not, if that construction is the true one, covenants to pay the sum of 2*l.* 15*s.*, but they are covenants to pay a sum not ascertainable until the date of payment arrives. That seems to me to be an extremely difficult construction to adopt, because I should be obliged to treat this document as meaning something which is totally different to the meaning which is impressed upon it by the whole of its wording, except for those words which I have read at the end of the first paragraph.

As I have said at the beginning of my remarks on this matter, the bond is impressed all over with the words "One hundred pounds." It is in my judgment, apart from the particular words which I have read, clearly a bond to secure payment of 100*l.* and no more and no less. Can I say that that is not the true meaning of the bond at all, but that the bond is a bond to secure payment of an unascertained sum to be ascertained in the way indicated? I have come to the conclusion that I cannot put that construction upon it. I feel the difficulty of adopting the view which I have adopted, because I agree with Mr. Cohen that I am, if I adopt that meaning, giving no real effect to the words "in gold coin of the United Kingdom of or equal to the standard of weight and fineness existing on the 1st day of September, 1928." I appreciate the difficulty and it is one that seems to me to be a very real one, but I must either adopt the plaintiff's construction of those words and put a meaning upon the words "One hundred pounds" which they will not properly bear, or I must treat the bond as being what it is, a bond to secure the payment of 100*l.*, although the result of doing so is that little or no weight is attached to the words which I have read.

It seems to me, therefore, that so far as the second declaration which the plaintiff asks me to make is concerned, I must decide against him. I have come to the conclusion that the bond as a whole is a bond to secure payment of 100*l.* Then, it is said, if that is so, nevertheless it is a bond to secure payment of 100*l.*, but that payment is to be made in a particular way—that is to say, in gold coins of or equal to the standard of weight and fineness, etc. Now I desire at once to say with regard to that, that this is not in my judgment and cannot be construed as a contract for the delivery of bullion. It is not a bullion contract, it is a contract for payment of a sum of money, but it is, I think, a contract for payment of a sum of money in a particular way, that is to say, by one particular form of legal tender and no other. If that be the true construction of the document, it presents very obvious difficulties. In the first place, there is no means and there was no means on September 25, 1928, by which the sum of 2*l.* 15*s.* could be paid in gold coins. That, of course, is a very obvious difficulty, but the fact remains that in my judgment on the true construction of the document, the obligation of the defendant company is to pay 100*l.* and interest in gold coins. If that be its true construction, as it is in my judgment, is the obligation to pay in gold coins one upon which the plaintiff can insist, or do the defendants satisfy their obligation if they pay to the plaintiff 100*l.* and the interest, or tender 100*l.* and interest in any form which is legal tender in this country at the time of tender?

In my judgment the true answer to that question is they do satisfy their obligation in that way. No doubt the parties to this contract contemplated payment in one particular way, but if the contract on its true construction is a contract to secure payment of a sum of money, and if the defendants tender the sum of money in question in whatever happens to be legal tender at the date of payment, they have discharged their obligation. If the obligation be to pay 100*l.* and they tender that amount, although it is not tendered in the particular form which the contract would appear to require, they will, in my judgment, have discharged their debt, and no action thereafter to recover the amount of the debt could possibly succeed, nor could the plaintiff obtain damages for breach of contract, because the contract is a contract to pay a debt, notwithstanding that the parties have endeavoured to provide that the payment of that debt shall be made in one particular form of tender and no other.

I am not deciding that such a provision is necessarily illegal. There is nothing to prevent the defendants' paying in gold coins and the plaintiff's accepting gold coins, but the conclusion to which I have come is this, that in this country there are certain things, paper and metal, which are legal tender, and for the purpose of paying a debt a tender of the appropriate amount of any of those symbols is sufficient to discharge the obligation. In my judgment, to attempt to impose upon the debtor an obligation to pay in one particular form of legal tender only is an attempt to do something which cannot be enforced if the contract is a mere contract for the payment of money. Of course, if the contract is a contract for the delivery of gold, then it is a contract which can be enforced and presumably enforced by specific performance, or at any rate, certainly by an action for damages, but, in my judgment, this is not a contract for the delivery of gold; it is a contract to pay a sum of money.

As I have said, although I am very much pressed with the difficulties which are involved, the conclusion to which I have come is that on the true construction of this document the defendants will satisfy and discharge their obligation if they tender to the plaintiff the amounts which become due from time to time in anything which is legal tender in this country at the time when such tender is made.

P. J. B.

C. A.

The plaintiff appealed. The appeal was heard on February 14 and 16, 1933, and judgment given on March 17, 1933.

A. T. Miller K.C., *Lionel Cohen K.C.*, and *Cyril Radcliffe* for the appellant. It is contended that the defendants are bound to pay the plaintiff both as regards principal and interest such a sum in sterling as may be sufficient at the time of payment to purchase in the market gold of not less weight and fineness than that contained in the gold coin of the United Kingdom which would have sufficed to discharge the payment on September 1, 1928. The question is one of construction, and the object of the words in providing for payment in gold coin of a certain standard of fineness was to make the payment independent of any depreciation of the currency or of Great Britain abandoning the gold standard. It is not giving any meaning to this provision to hold that the bond can be redeemed by a payment of 100*l.* sterling. The bond is not a sterling bond, because after the provision for payment in sterling the words have been added, "in gold coin of the United Kingdom of or equal to the standard of weight and fineness existing on the 1st day of September, 1928." The effect of Farwell J.'s decision is to deprive those words of all meaning. If the bond does not amount to a bullion contract, it does, while providing for a sterling payment, fix a measure of the amount payable independently of any depreciation of sterling. The payment is to be measured by reference to gold. It is recognized that payment cannot be in gold coin. The Bank's obligation to pay notes in gold coin ceased on the coming into force of the Gold Standard Act, 1925, s. 1, sub-s. 1. After that there was a bullion gold standard, which was brought to an end by the Gold Standard Amendment Act, 1931. But the provision as to payment in the bond must be construed in such a way as best to effectuate the intention of the parties to be collected from the whole document: *Ford* v. *Beech.* (1) That can be done here by treating the reference to gold coin of the particular standard of weight and fineness as simply fixing a measure of the liability in sterling by reference to gold. A business efficacy ought to be given to the document. The intention can be given effect even although it is not the literal meaning of the expression in the document: *M'Cowan* v. *Baine.* (2) Farwell J. has attached too much weight to the fact that the bond is called a 100*l.* bond. It cannot have been intended by this bond that payment should be made in gold sovereigns, or that if the country was off the gold standard it was to be satisfied by paper money of the same nominal amount.

Gavin Simonds K.C. and *H. S. G. Buckmaster* for the respondents. Two quite different things arise for consideration in this case. The first is that of the construction of the bond, and the second the legal effect of it when construed. Here the bond creates a clear obligation to pay a sum of money, that is, a debt. It is not, then, a bullion contract, but a contract to pay a certain number of units of account. It creates a debt and nothing but a debt. Then, if so, what is the quantum of that debt; that is, how many units of account has the company rendered itself liable to pay? The Court should not be prejudiced in ascertaining this, because the true construction may not have the effect contemplated by the parties. The bond is a debt for 100*l.* and no more, and it is to be paid in sterling in gold coins of the United Kingdom of a particular standard. What difference can there be between a provision to pay 100*l.* and a provision to pay it in gold coins of the United Kingdom? It can only have been intended to refer to gold coins which are legal tender; otherwise it would be void.

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(1) (1848) 11 Q. B. 852.

(2) [1891] A. C. 401, 408.

The standard of gold coins was fixed by the Coinage Act, 1870, s. 3, subject to allowable variations. Therefore it is impossible to predicate the exact weight and fineness of coins. The effect of an agreement to pay 100*l.* is that it must be paid in whatever happens to be legal tender: see s. 6 of the Act of 1870. What difference, then, can result from saying it is to be paid in gold coins of a particular weight and fineness? If these gold coins are not legal tender, it cannot be so paid but only in legal tender. The provision for payment in gold coins is ineffectual, because by statute payment must be made in notes. A debt may be discharged by whatever is legal tender, and a provision for its payment in gold or gold coins is nugatory. A debt is not an agreement to deliver a commodity. If 100*l.* in notes were paid to the plaintiff as the holder of the bond, and it was only accepted by him on account, he would still have no cause of action, for the debt would have been satisfied. The parties cannot agree to payment being made in only one kind of legal tender and not another, for if it were paid in the other no liability would be left that the law could enforce. For currency purposes notes and sovereigns are equal.

[LORD HANWORTH M.R. It is material to notice that by the Currency and Bank Notes Act, 1928, s. 11, sub-s. 2, the Bank can require gold to be handed over on payment of the nominal value.]

Since 1833 bank-notes have been legal tender, and since then a debtor has been at liberty to pay his debts in notes. That must be so here also, and it follows that the decision appealed against was correct.

A. T. Miller K.C. in reply. The appellant challenges the respondents' basic contention that this bond constitutes an obligation for a debt of 100*l.* It is of the essence of a debt that it should be a sum certain payable in any form of legal currency. The bond in this case creates an obligation to pay a sum of money to be fixed in the future by the application of the appropriate standards of value. The principal moneys are to be ascertained by a particular measure and then paid in sterling. The argument for the respondents gives no meaning at all to the words, "in gold coin of the United Kingdom of or equal to the standard of weight and fineness existing" on the date mentioned. Even if that be construed not as a measure of the liability, but as an undertaking to pay in the particular form of currency, there is nothing in the Coinage Act, 1870, s. 6, to make such an obligation illegal.

[ROMER L.J. The bond is a transaction relating to the payment of money, and s. 6 provides for payment in currency.]

The agreement to pay in gold coin of a particular weight and fineness is not providing for payment in any mode infringing the prerogative: see *Bronson* v. *Rodes.* (1)

Cur. adv. vult.

1933. March 17. LORD HANWORTH M.R. Josiah Feist is the holder of a bearer bond for 100*l.* issued by the defendants and dated September 1, 1928.

By an originating summons issued on June 24, 1932, he seeks two alternative declarations as to the true construction of this bond. It is noteworthy that his summons is issued in the matter of a thirty-five years sinking fund 5½ per cent.

(1) (1868) 7 Wallace, 229.

sterling bond for 100*l.* numbered 0426, being part of an issue of 500,000*l.* such bonds made by the Société Intercommunale Belge d'Electricité.

Mr. Miller, who argued the appeal, preferred to ask for the declaration which appeared second upon the summons: A declaration that, upon the true construction of the said bond, the defendants are bound to pay to the plaintiff as holder thereof in discharge of the principal and interest from time to time due upon such bond at the times therein specified, such a sum in sterling as may be sufficient to purchase in the market on the day of payment, gold of not less weight and fineness than that contained in the gold coin of the United Kingdom which would have sufficed to discharge such payment if falling due on September 1, 1928. In the notice of appeal that declaration was worded differently —namely: "That upon the true construction of the said bond the defendants are bound to pay to the plaintiff, as holder thereof, the principal monies and interest from time to time due upon such bond at the times therein specified upon the basis that such holder is entitled to receive in discharge thereof, in addition to the nominal amount in sterling, i.e. 100*l.* mentioned in such bond, a sum in sterling representing any decrease on the day of payment in the gold value of such nominal amount, 100*l.*, as compared with the gold value of the same nominal amount, 100*l.*, on the 1st day of September, 1928." An alternative declaration suggested was: "That upon the true construction of the said bond the defendants thereby warrant or guarantee to the plaintiff, as holder of such bond, that they will discharge their obligations thereunder by tendering him in payment of the principal monies and interest due upon such bond as specified therein, gold coin of the United Kingdom to the nominal amount specified in the bond of or equal to the standard of weight and fineness existing on 1st September, 1928"; and, it must be added, by no other form of legal tender.

Except for words which are to be found in clause 1 of the terms of the bond, the nature of the contract is one which is well-known and simple. The bond is one of a total of

500,000*l.* offered for sale in September, 1928. The bond in question is one for 100*l.* Clause 1 states that the Société "for value received, will on 1st September, 1963, or on such earlier day as the principal monies thereby secured become payable, in accordance with the conditions endorsed hereon, pay to the bearer on presentation of this bond the sum of 100*l.* in sterling." The conditions referred to that are material are two only. By 18 (1.): "This bond shall be construed and the rights of parties regulated according to the law of England and as a contract made, and according to the terms thereof, to be performed in England and the parties submit to the jurisdiction of the English Courts." By clause 6: "The bonds of this issue shall constitute and they, and each of them, hereby are declared to be the direct and unconditional liability and obligations of the company in sterling in gold coin of the United Kingdom in accordance with the provisions of the bonds and these conditions."

Indorsed upon the back at the end of the conditions is a schedule containing a redemption table. The figures in it are based upon the simple reduction of the bonds outstanding by redemption by half-yearly payments over the period of time during which the remaining and decreasing number of bonds is outstanding. The figures are calculated on a simple sterling basis.

Such a bond appears plain enough in its terms. It is a bond to repay a sum in return for value received—the quota of 500,000*l.* represented by the number of pounds stated on the face of the bond, in sterling. This last word connotes the standard currency of this country, for the contract is to be interpreted according to English law. By s. 6 of the Coinage Act, 1870 (33 Vict. c. 10): "Every contract, ... and security for money, and every transaction, dealing, matter, and thing whatever relating to money, or involving the payment of, or the liability to pay any money, ... shall be made, executed, entered into, done and had according to the coins which are current and legal tender in pursuance of this Act, and not otherwise." That is to say, in the case of 100*l.*, in gold coins, at any rate to the number of 98*l.* out of the 100*l.*, for by Lord Liverpool's Act (56 Geo. 3, c. 68) gold coin alone was legal tender, except that silver could be used for that purpose up to 40*s.* Later statutes have to some extent altered the character of gold as the only legal tender. By 3 & 4 Will. 4, c. 98, s. 6, notes of the Bank of England were made legal tender for all sums above 5*l.* " so long as the Bank of England shall continue to pay on demand their said notes in legal coin."

No further alteration was made in sterling until the Great War when, by an Act, 4 & 5 Geo. 5, c. 14, passed at its outbreak, the Treasury were authorized to issue currency notes for 1*l.* and for ten shillings; and those notes were made current in the United Kingdom " in the same manner, and to the same extent and as fully as sovereigns and half-sovereigns are current, and shall be legal tender in the United Kingdom for the payment of any amount."

The limitation that bank-notes should be legal tender only so long as the Bank of England continued to pay on demand their notes in legal coin was withdrawn in 1925 by s. 1, sub-s. 1, of an Act to facilitate the return to a gold standard (15 & 16 Geo. 5, c. 29); and thenceforward bank-notes were legal tender unconditionally. Afterwards, in 1928, the Treasury ceased to issue these notes, and once more the issue of notes was given to the Bank of England, but in the same denominations of 1*l.* and ten shillings (see 18 & 19 Geo. 5, c. 13, s. 1, sub-s. 2), and these were made legal tender for the payment of any amount. There is a provision in this Act, s. 11, sub-s. 2, which may have some bearing upon the question that has to be discussed later on as to other words in this bond. That section confers power upon the Bank of England " with a view to the concentration of the gold reserves and to the securing of economy in the use of gold." It required a person to make a return of gold owned by that person, and to sell it to the Bank, " on payment therefor by the Bank, in the case of coin, of the nominal value thereof."

Mr. Miller pressed upon us the canon laid down by Parke B. in *Ford* v. *Beech* (1) as to the construction to be placed upon an agreement—namely, "that it ought to receive that construction which its language will admit, and which will best effectuate the intention of the parties, to be collected from the whole of the agreement, and that greater regard is to be had to the clear intent of the parties than to any particular words which they may have used in the expression of their intent." That principle is very apt for the purpose of the construction of this bond, particularly that part of it which directs attention to the whole of the agreement. For we have here a contract to repay a debt which is to be construed, and the rights of the parties thereunder regulated, according to the law of England. That law has withdrawn gold from circulation, and imposes the burden upon any holders of gold coins that they may be called in at their nominal and not at their bullion value. That law also directs that a liability to pay any money shall be satisfied according to the coins that are current and legal tender. Gold coins are not now available, and in their place, and representing sterling, are notes of the Bank of England. But the plaintiff relies upon the words that follow "sterling" in clause 1: "in gold coin of the United Kingdom of or equal to the standard of weight and fineness existing on the 1st day of September, 1928." These words are said to alter the bond from being a security to ensure the payment of one hundred pounds in the manner prescribed by English law, into a contract to pay a future sum of money to be ascertained by calculation, on the basis of a specified standard of gold, adjusted in weight and fineness, and not necessarily that which attached to gold coins, if any, at the time of payment.

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(1) 11 Q. B. 852, 866.

It is claimed that the bond is an obligation to pay over a number of gold coins of a particular fineness—not necessarily the fineness prevailing in the current coinage, which could be changed, if the remedy were diminished, from time to time under s. 11 of the Coinage Act of 1870.

Mr. Cohen agrees that such an interpretation does require the transposition of the words "in gold" and "in sterling." It does more; it neglects to give effect to the word "sterling." It establishes a measure of liability as above claimed, and declines to accept "in sterling" or "in gold coin of the United Kingdom"—see condition 6—as the mode of payment. It turns the bond into a contract to hand over a quantum of gold of a certain fineness. Such an interpretation runs counter to the intention of the parties to be collected from the whole of the agreement. It sets aside condition 6 and the regulation of the rights of the parties by English law. It renders the redemption table inaccurate, and indeed misleading.

I cannot so construe the bond. The coupons for the payment of interest, 2*l.* 15*s.* in sterling gold coin, are impossible of performance as they stand; and on the point before the Court I only desire to say that I can find no assistance from them towards the proper construction of the bond.

We were pressed in reply by Mr. Miller with the case of *Bronson* v. *Rodes* (1), decided in the Supreme Court of the United States. That case, when carefully examined, does not assist this Court by its reasoning. The contract there under consideration was different in an essential feature from that of the bond in the present proceeding. Its terms required payment "in gold and silver coin lawful money of the United States." There was no such term as "sterling," as there is here. There was no ambiguity by alternatives.

Next, there were at that time in existence in the United States two currencies—one metallic, the other paper. No value was prescribed for the treasury note dollars by statute, and indeed the payment of duties by treasury note dollars was forbidden. A discrimination was thus made against them. The Court held that the contract specially stipulated for payment in gold and silver coin and excluded any other, and that mode of payment remained practicable. The Chief Justice (Chase) says (2): "It must be observed that the laws for the coinage of gold and silver have never been repealed or modified. They remain on the statute book in full force. And the emission of gold and silver coins from the mint continues; the actual coinage during the last fiscal year having exceeded . . . . nineteen

(1) 7 Wallace, 229.

(2) Ibid. 251.

millions of dollars." At the present time in the United Kingdom there is no issue of gold coinage. Gold coins can be commandeered under s. 11 above, and paid for at their nominal value. Bank-notes are legal tender and currency.

For these reasons I am of opinion that the judgment of Farwell J. is right, and that the declaration he made correctly declares the interpretation to be put upon the bond. The appeal must be dismissed.

Lawrence L.J. This case raises a somewhat difficult question as to the true meaning and effect of a bond for 100*l.*, being one of a series of similar bonds issued by the defendant company for securing an aggregate principal amount of 500,000*l.* The bond provides that the company is to pay both the principal and the interest "in sterling in gold coin of the United Kingdom of or equal to the standard of weight and fineness existing on the 1st day of September, 1928." It is this stipulation which has given rise to the difficulty; otherwise the bond is more or less in common form. In order to determine the meaning and effect of this stipulation it is necessary to ascertain first of all the character of the obligation which the company has undertaken under the bond, and in the next place the quantum of that obligation.

Dealing first with the character of the obligation, the question is whether the obligation of the company under the bond resolves itself into a debt, or whether it is such as to require the delivery by the company of a number of gold coins of a certain weight and fineness the legal import of which would be an agreement to deliver a certain weight of standard gold differing only from a contract to deliver bullion in that the amount of gold to be delivered would be ascertained by count and not by assay and scales. Having regard to the terms of the bond as a whole, I am clearly of opinion that the obligation undertaken by the company is to pay certain sums of money expressed in sterling (that is, certain units of account) in gold coins of the United Kingdom and not to deliver a number of gold coins, regarding them not as currency but as articles of traffic or commodities merely. If that be the right construction of the bond, it follows that the true character of the obligation undertaken is the payment of a debt with interest thereon until it is paid off.

The next and more difficult question is what is the quantum of the company's obligation under the bond? The plaintiff contended—and this was his main contention in the case—that the stipulation which I have quoted at the commencement of this judgment indicated the measure of the company's liability under the bond and determined the quantum of the debt and interest which the company had undertaken to pay, and not merely the mode in which that indebtedness was to be discharged, and accordingly that the amount payable by the company to the plaintiff under the bond falls to be ascertained by adding to the nominal amounts of the principal money and interest therein mentioned a further sum in sterling equivalent to any decrease at the time of payment in the gold value of such nominal amounts as compared with the gold value of the same nominal amounts on September 1, 1928. This contention no doubt derives support from the fact that at the date of the bond gold coins of the United Kingdom, though still part of the metallic currency of this country, were no longer in general circulation, and further from the fact that there was no gold coin of smaller denomination that half a sovereign, and that therefore it was not possible to pay the sum of 2*l.* 15*s.* mentioned in each coupon in gold coin. In these circumstances there is much force in the contention that, in order to give business efficacy to the bond, the stipulation in question ought to be construed as the measure of liability and not merely as the mode of payment, and I confess that my mind has fluctuated in the course of the argument on this point. On consideration, however, I have come to the conclusion that the principal money secured by the bond is a definite sum of 100*l.* sterling, and not an uncertain amount to be ascertained on the day of payment by adding to the sum therein specified a further amount of sterling in the event of a decrease in the gold value of that specified sum; and the same reasoning applies to the sum of 2*l.* 15*s.* mentioned in each coupon. It would, I think, be unduly stretching the meaning of the language actually employed to construe the stipulation in question as measuring the amount of the company's liability under the bond rather than as indicating the mode in which that liability was to be discharged.

On the assumption that the conclusions reached by me as to the character and quantum of the company's obligation under the bond are correct, there only remains the question: What is the legal effect of the company having agreed to discharge its indebtedness under the bond in gold coins of the United Kingdom of the weight and fineness existing on September 1, 1928?

The Coinage Act, 1870, was in force on September 1, 1928, and is still in force. Sect. 3 prescribes the standard of weight and fineness of all coins made at the Royal Mint in England. Sect. 4 provides that a tender of payment of money, if made in coins issued by the Mint, shall be a legal tender in case of gold coins for a payment of any amount, in case of silver coins for a payment of an amount not exceeding 40*s.* 0*d.*, and in case of bronze coins for a payment not exceeding 1*s.* 0*d.*, and that nothing in the Act should prevent any paper currency which under any Act or otherwise was a legal tender from being a legal tender; and s. 6 provides that any contract and transaction relating to money or involving the payment of or the liability to pay any money made or entered into shall be made or entered into according to the coins which are current and legal tender in pursuance of that Act and not otherwise.

By the combined operation of s. 6 of the Bank of England Act, 1833, and s. 1, sub-s. 2, of the Currency and Bank Notes Act, 1928, it is provided that bank-notes issued by the Bank of England should be legal tender for the payment of any amount; thus giving to those bank-notes the legal value and character of the amount in sterling for which they were issued.

The stipulation in the bond that the principle moneys and interest thereby secured are to be paid in gold coins of the United Kingdom of the standard of weight and fineness existing on September 1, 1928, differs only from what would otherwise have been implied by virtue of s. 6 of the Act of 1870, in that there is no reference in it to silver and bronze coins which under s. 4 are legal tender for an aggregate amount of 41*s*. 0*d*. In these circumstances, the stipulation in question either states in substance what would be implied by law or, if the omission of silver and bronze coins be regarded as a substantial departure from the provisions of s. 6, is contrary to those provisions and therefore invalid. In either case the stipulation does not and cannot, in my opinion, prevent bank-notes which under the Acts of 1833 and 1928 are made legal tender from being legal tender. The plaintiff, under the express terms of those Acts, is legally bound to accept bank-notes in payment of the moneys secured by the bond, and upon such payment the indebtedness of the company under the bond would be discharged and the obligation thereunder extinguished. No action would thereafter lie for breach of the contract to pay in gold coins, as the contract is one for the payment of a debt and not for the delivery of specie. A contract that a debt shall be discharged by payment in gold coins (being one form of legal tender) cannot abrogate the enactment by the Legislature that the debt may be discharged by payment in bank notes (being another form of legal tender). Accordingly, if the debt be legally discharged, no damages can be recovered by the creditor, because the debt is discharged in a mode which, although different from that agreed upon, yet operates effectually to put an end to the obligation of the debtor under the bond.

The parties may not have foreseen this result, and I agree with Farwell J. that it renders the stipulation as to payment in gold coins otiose ; but that result is brought about by the Legislature and affords no ground for construing the language which the parties have chosen to employ otherwise than in its natural meaning.

Mr. Miller, in his reply, cited the case of *Bronson* v. *Rodes* (1), decided in the Supreme Court of the United States of

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(1) 7 Wallace, 229.

America. The Court in that case, by a majority, decided that a bond given for payment of a sum of 1400 dollars in gold and silver coins, lawful money of the United States, with interest also in coin at a rate specified until repayment, cannot be discharged by a tender of United States notes issued under the Loan and Currency Acts, 1862 and 1863, and by them declared to be lawful money and a legal tender for the payment of debts. I have read and considered the judgments in that case and in the case of *Butler* v. *Horwitz* (1), where the same Court held that a contract to pay a certain sum in gold and silver coins is, in substance and legal effect, a contract to deliver a certain weight of gold and silver of a certain fineness to be ascertained by count. I have stated my reasons for coming to a conclusion in the present case contrary to that reached by the majority of the learned judges in the American cases referred to, and, in so far as the opinions of those judges are applicable to the facts of the present case, I respectfully differ from them and prefer the reasoning of Miller J., who in both cases dissented from the opinions expressed by his colleagues.

Summarizing my reasons for agreeing with the decision of Farwell J. in the present case: The obligation of the company under the bond is to pay a debt and not to deliver gold coins; the amount of the debt is 100*l.* sterling carrying interest at the rate of 5½ per cent. per annum until payment; the company has agreed to pay that debt and interest in gold coins, but the Legislature has enacted that the debt and interest may lawfully be discharged by tendering bank-notes; the company is therefore entitled, notwithstanding the agreement to pay in gold coins, to discharge its indebtedness by tendering bank-notes and to extinguish its obligation under the bond by that mode of payment.

For these reasons I agree that this appeal fails and should be dismissed.

Romer L.J. By his notice of appeal the appellant seeks to have it determined that, upon the true construction of the defendants' bond now held by him, the defendants are bound to pay him upon the basis that the holder of the bond is entitled to receive in discharge of his principal moneys and interest from time to time due upon such bond, in addition to the nominal amount in sterling mentioned in such bond, a sum in sterling representing any decrease on the day of payment in the gold value of such nominal amount as compared with the gold value of the same nominal amount on September 1, 1928.

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(1) (1868) 7 Wallace, 258.

Such a construction appears to me to be an impossible one. If one thing be clear about the bond, it is that it is a bond for 100*l.* sterling. It is called on the face of it a bond for 100*l.* both in words and in figures. By it the company undertakes to pay the bearer when the principal money becomes payable the sum of 100*l.* in sterling, and to pay him in the meantime interest thereon at the rate of 5½ per cent. per annum in sterling by equal half-yearly payments, in accordance with the coupons annexed thereto. Each coupon describes the bond as a sterling bond for 100*l.*, and is stated to represent 2*l.* 15*s.* How the principal money and interest are to be paid is a different matter, but it is, in my opinion, impossible as a matter of construction to treat the bond as being one to secure a larger sum of principal than 100*l.* or larger half-yearly sums of interest than 2*l.* 15*s.* In other words, I am not prepared to construe the bond as one to secure such a sum of money as is equal to the gold value of one hundred British sovereigns at the relevant date, or the coupons as imposing an obligation upon the company to pay each half-year so much money as is equal to the gold value of 2¾ British sovereigns at the time of payment.

But the appellant, in the alternative, asks to have it declared that upon the true construction of the said bond the defendants thereby warranted or guaranteed to the plaintiff as holder of such bond that they would discharge their obligations thereunder by tendering him in payment of the principal moneys and interest due upon such bond gold coin of the United Kingdom to the nominal amount

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specified in the bond of or equal to the standard of weight and fineness existing on September 1, 1928. As to this, I can see no justification for introducing into the bond any warranty or guarantee as to how the defendants' obligations thereunder are to be discharged. I can, however, see good ground for construing the obligation as one to pay the principal money and the interest in gold coin of the United Kingdom of the standard of weight and fineness existing on September 1, 1928. Indeed, this is what the bond says in terms. Let me consider the obligation as to the principal. It is in these terms: "will . . . . pay to the bearer . . . . the sum of 100*l.* in sterling in gold coin of the United Kingdom of or equal to the standard of weight and fineness existing on the 1st day of September, 1928." Now the words "100*l.* in sterling" mean no more than "100*l.* sterling," that is to say, one hundred pounds of the United Kingdom. The words "in sterling" are, as it seems to me, mere surplusage in view of the fact that the bond has to be construed according to English law. The words "or equal to" are also mere surplusage. A thing that is of a ton weight must be of a weight equal to a ton. The obligation, therefore, seems to be one to pay 100*l.* in gold coin of the United Kingdom of the standard weight and fineness existing on September 1, 1928. What is the legal effect of such an obligation I must consider in a moment, but the obligation is in its terms perfectly intelligible. If the obligation were merely one to pay 100*l.*, it could legally be discharged by the defendants in whatever currency happened to be legal tender for the sum at the time of discharge. The defendants, however, for quite obvious reasons, have promised to pay the 100*l.* in a particular form of currency—namely, the gold currency as it existed on September 1, 1928, to the exclusion, as I understand the bond, of all other forms of currency. They have, therefore, purported to prohibit themselves from paying any part of the 100*l.* in notes, silver or bronze, and indeed from paying it in any gold coin that may hereafter be issued of a denomination not existing on the date in question; for though any such coin would be by virtue of the Coinage Act, 1870, of the standard fineness referred to in the bond, it would not be of the standard weight. That such a contract would, as to the principal sum, be practically impossible of performance at the present time, and in relation to the half-yearly interest would be absolutely impossible at all times, is not a reason for rejecting the construction to which I have referred, unless the bond permits of some other construction; and, speaking for myself, I cannot think that any other construction is permissible if effect is to be given, as effect should be given, to every part of the document.

The next question that arises on the appeal is whether effect can be given in law to an agreement to pay a sum of money in one only of the forms of legal tender, to the exclusion of all others. In order to determine this question it is necessary to consider the provisions of the Coinage Act, 1870. It is provided by s. 3 that all coins made at the Mint of the denominations mentioned in the First Schedule to the Act are to be of the weight and fineness therein specified. The section then proceeds as follows: "If any coin of gold, silver, or bronze, but of any other denomination than that of the coins mentioned in the first schedule to this Act, is hereafter coined at the Mint, such coin shall be of a weight and fineness bearing the same proportion to the weight and fineness specified in that schedule as the denomination of such coin bears to the denominations mentioned in that schedule." By virtue of s. 11 of the Act the denominations of coins to be coined at the Mint may from time to time be determined by Royal Proclamation. It is therefore possible that a gold coin may hereafter be issued by the Mint of a denomination and, therefore, of a weight different from that of any existing gold coin of the United Kingdom. By s. 4 of the Act a tender of payment of money if made in coins which have been issued by the Mint in accordance with the provisions of the Act is made legal tender, in the case of gold coins for a payment of any amount, in the case of silver coins for a payment of any amount not exceeding 40*s.* 0*d.*, and in the case of bronze coins for a payment of any amount not exceeding 1*s.* 0*d.* That section concludes with the words: "Nothing in this Act shall prevent any paper currency which under any Act or otherwise is a legal tender from being a legal tender." Sect. 6 is of great importance and is in the following words: "Every contract, sale, payment, bill, note, instrument, and security for money, and every transaction, dealing, matter, and thing whatever relating to money, ... which is made, executed, or entered into, done or had, shall be made, executed, entered into, done and had according to the coins which are current and legal tender in pursuance of this Act, and not otherwise, unless the same be made, executed, entered into, done or had according to the currency of some British possession or some foreign state." Now it is clear from this section that a contract to pay a sum of money must be treated as a contract to pay it in coins of the United Kingdom and not otherwise, though such a contract may be discharged in paper currency that is legal tender. Such a contract cannot, therefore, for instance, provide for payment in American dollars. But not only must the contract provide for payment in coins of the United Kingdom, it must also be treated as providing for payment "according" to the coins which are current and legal tender in pursuance of the Act, and not otherwise. This seems to render illegal a contract to exclude the provisions of the Acts as to legal tender. It would be strange if it were not so, for these provisions are an essential feature of our currency law, and great confusion and public inconvenience and loss might be occasioned if they were to be disregarded. Consider, for instance, the position of the silver coinage. As it is only legal tender for sums not exceeding 40*s.* 0*d.*, it is not necessary to mint and put into circulation more than is likely to be required in view of that fact. If, therefore, contracts to pay large sums exclusively in silver coins were permissible, the result might be seriously to diminish the silver coinage available for the public at large, causing temporary inconvenience to them and imposing upon the Mint the necessity of coining more. In the year 1919 the price of silver rose rapidly, and it appears that on February 11, 1920, the silver value of a half-crown was about 3*s.* 4½*d.* In consequence of this the Coinage Act of that year was passed, reducing the standard fineness of the silver coinage ; but it illustrates the possibility that under certain conditions endeavours might be made by creditors to be paid large sums in silver and the loss that might thereby be caused to the country.

For these reasons I am of opinion that any contract that attempts to exclude a payment of money by tendering any coins that are made legal tender by the Act of 1870 is illegal. In the present case the company purports, in effect, to debar itself from paying in silver or bronze coins any part of the principal or interest secured by the bond or from paying any such part in gold coins of a different denomination from any that existed on September 1, 1928. This, in my judgment, is not permissible, and the bond must, therefore, be treated as though the words "in gold coin of the United Kingdom of or equal to the standard weight and fineness existing on the 1st day of September, 1928," were excluded.

That being so, the company can from time to time discharge their liability under the bond, whether for principal or interest, by payment of any sterling currency, whether paper, gold, silver or bronze, that constitutes for the time being legal tender for the amount due.

For these reasons, which are substantially the reasons given by Farwell J., the appeal in my judgment fails and must be dismissed.

Appeal dismissed.

Solicitors for appellant : *Allen & Overy.*

Solicitors for respondents : *Stephenson, Harwood & Tatham.*

H. C. G.

C. A.

1932
LUXMOORE
J.

Jan. 26, 27, 28, 29;
Feb. 2, 3, 15;
July 5.

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Feb. 3, 6, 7, 28;
March 2.

GEE *v.* HARWOOD.

[1930. G. 2475.]

Landlord and Tenant—Underlease—Company as Tenant—Compulsory Winding-up Order—Action for Relief from Forfeiture—Action commenced within One Year of Beginning of Winding-up—Action heard after Expiration of Year—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 146, *sub-ss.* 1, 2, 9, 10.

By an underlease dated September 10, 1928, the defendant demised to the plaintiffs, the Braceborough Spa Co., Ld., certain lands and buildings at Braceborough, Lincs, known as Braceborough Spa, for a period of fifty years, less one month, from March 25, 1927. On May 22, 1930, a petition to wind up the Company was presented, and on June 2, 1930, a compulsory winding-up order was made. On the facts as found the defendant was from then until October 23, 1930, trying by means other than action to put an end to the underlease, and on October 23, 1930, the liquidator commenced these proceedings asking for (1.) a declaration that the underlease was still on foot; (2.) (alternatively) relief against forfeiture; and (3.) a declaration that the plaintiff Company was at liberty to assign the premises comprised in the underlease to the plaintiff Gee without obtaining the defendant's consent:—

Held, by Luxmoore J., (1.) that on the facts the underlease had not been determined before the winding-up order; (2.) that the underlease was not a lease of mines or minerals or of property with respect to which the personal qualifications of the tenant were of importance for the preservation of the value or character of the property so as to bring the case within s. 146, sub-s. 9, of the Law of Property Act, 1925; (3.) that the Company's interest in the underlease had not been sold within one year from the winding-up so as to bring the case within s. 146, sub-s. 10 (*a*); (4.) that as the proceedings for relief had been commenced within a year of the beginning of the winding-up it was within the discretion of the Court to grant relief from forfeiture on such terms as it thought fit having regard to sub-ss. 2 and 10 (*b*) of the section, although the proceedings for relief did not come on for hearing till after the year had expired, and relief was granted on terms. There was no appeal from Luxmoore J.'s decision on the second and third points.

Held, by the Court of Appeal (affirming the decision of Luxmoore J. on these points), (1.) that there had been no re-entry for non-payment of rent by the defendant before the date of the winding-up order; (2.) that the Court had discretion under the Law of Property Act, 1925, s. 146, to grant relief from forfeiture, as the case fell within sub-s. 10 (*b*) of the section, which on its true construction entitled the liquidator to apply for relief within a year of the winding-up, when the demised property had not been sold, and neither limited the relief given to that period nor made it necessary that the application should be heard within that period; and (3.) that relief had been granted on proper terms.

WITNESS ACTION.

The plaintiffs, George C. G. Gee and Braceborough Spa, Ld., in this action claimed: (1.) A declaration that an underlease, dated September 10, 1928, and made between the defendant and the plaintiff Company, was still subsisting and on foot, and that the plaintiff Company was entitled to retain possession of the premises comprised therein, subject to payment of the rents and royalties thereby reserved; (2.) alternatively relief from any forfeiture of the underlease on payment of the rents and royalties thereby reserved or otherwise on such terms and conditions as might be just and equitable; and (3.) a declaration that the plaintiff Company was at liberty to assign the premises comprised in the underlease to the plaintiff Gee without obtaining any consent from the defendant. The defendant counterclaimed for a declaration that the underlease was determined by the defendant in October, 1929, by re-entry upon the premises or alternatively that the same was determined on June 2, 1930, when the plaintiff Company went into compulsory liquidation, or further and in the alternative that the defendant was now entitled to determine the underlease by entry upon the premises by virtue of the fact that the plaintiff Company had ceased to use the same for the sale, distribution or other use of the natural water for a period of twelve consecutive months from June 2, 1930, and that the underlease had ceased to exist.

The facts are fully set out in the judgment of Luxmoore J.

Harold Christie and *G. O. Slade* for the plaintiffs.

P. Gordon Bamber and *R. L. Daniell* for the defendant.

Cur. adv. vult.

1932. July 5. LUXMOORE J. [after stating the claims of the plaintiffs and the defendant:] The action was brought in these circumstances. The defendant at the date of the grant of the underlease was lessee of certain lands and buildings at Braceborough, in the county of Lincoln, known

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as Braceborough Spa. Whether she held the lease for her own benefit or as trustee for her mother, or for any other person or company, does not appear, and is probably immaterial so far as this action is concerned. I do not propose to say anything more about it except that the circumstances relating to the grant of the underlease and the conduct of the defendant and her mother and the other persons responsible for the formation of the plaintiff Company and the management of its affairs in relation to the premises, certainly give rise to grave doubt as to the beneficial ownership of the lease.

On September 10, 1928, the defendant executed in favour of the plaintiff Company an underlease of Braceborough Spa for the term of fifty years less one month from March 25, 1927. The demise was expressed to be made in consideration of 5000*l*. The property is described in the underlease in these terms: "All those pieces or parcels of land situated at Braceborough in the County of Lincoln with the cottages and buildings erected thereon and known as Braceborough Spa, which said hereditaments and premises are delineated and coloured pink on the plan drawn on a lease dated the 3rd March, 1928, and made between Sir Henry Cracroft Trollope, Bart., of the one part and the lessor of the other part and which premises are to be occupied and used by the lessees in connection with their business, sale and distribution of the natural waters that rise on the hereditaments hereby demised, but excluding for the personal use of the said Sir Henry Cracroft Trollope, but not further or otherwise, water for his own medicinal requirements and together with all other the premises demised by the said lease."

The plaintiff Company was incorporated on June 30, 1927. Its directors were Mrs. Turquand, the mother of the defendant, and a gentleman named Kellow. The main object was to carry on the business of spa and hotel proprietors, and the underlease referred to was obtained with a view to carrying out this object. The demised premises included a building which was in fact used and carried on as an hotel and hydropathic establishment. The underlease contained the following covenant, to which it is material to refer, clause 3: "The lessees shall pay to the lessor by way of rent or royalty a sum at the rate of one penny on every quart bottle of the natural water derived by the lessees during the term hereby granted from the hereditaments hereby demised as may be sold by the lessees and not consumed on the hereditaments hereby demised and also one halfpenny on every gallon of water supplied and sold in bulk." Clause 4: "The lessees shall pay to the lessor by way of further rent such a sum as represents five per cent. of the gross receipts by the lessees from: (*a*) natural waters sold and consumed on the premises hereby demised, and (*b*) the using of the premises hereby demised or any part thereof as a bathing establishment." Clause 5: "The said yearly rents or royalties are to be paid by equal half yearly payments on the 25th day of March and the 29th day of September in each year, the first payment to be deemed to have become due and payable as on the 29th day of September 1927." Clause 6 is in the following terms: "The lessees hereby for themselves their successors and assigns covenant with the lessor that the lessees"—then follow a number of covenants, set out in the following clauses. The material clauses are as follows: Clause 7 "Will pay to the lessor the said rents or royalties hereinbefore reserved on the days and in the manner hereinbefore appointed for payment thereof clear of all deductions (except taxes imposed by Statute upon landlords notwithstanding any contract to the contrary) and also will pay to the lessor at the expiration of each year of the said term such sum (if any) as may be required to make up with the sums paid during that year in respect of rent and royalties as aforesaid the clear annual sum of One hundred pounds." Clause 10: "Will within 21 days after the expiration of each half year of the said term furnish the lessor or her agent for the time being with the correct and proper account in writing of all sales of natural water and of all receipts from the sources specified in clause 4 herein during such half year and will afford all reasonable facilities to the lessor or her agent including access to the lessees books for checking the accuracy of any such accounts as aforesaid." Clause 11 limits the selling price of the water, and clause 12 contains the usual covenant against assignment, underletting or parting with possession without the previous consent in writing of the lessor for the time being, with the common provision that such consent shall not be unreasonably or arbitrarily withheld. Clause 14 contains the lessor's covenant for quiet enjoyment. Clause 15 confers a special power of distress, while clause 16 contains the proviso for re-entry. It is in these terms: "If any part of the rents and royalties hereby reserved shall be unpaid for 30 days after becoming payable (whether formally demanded or not) or if the lessees shall at any time during the term hereby granted cease to use the demised premises for the sale, distribution or other use of the said natural water for a period of twelve successive calendar months (such cessation not being due to accident, labour distress or any unavoidable occurrence) or if an assignee, not being a corporation, whilst the demised premises or any part thereof shall remain vested in him shall become bankrupt or in the case of the lessees or of an assignee being a limited company shall whilst the demised premises or any part thereof remain vested in them go into liquidation other than voluntary for the purpose of reconstruction or amalgamation or if a receiver shall be appointed or if any covenant on the lessees' part herein contained shall not be performed or observed then and in any of the said cases it shall be lawful for the lessor at any time thereafter upon the demised premises or any part thereof in the name of the whole to re-enter and thereupon this demise shall absolutely determine but without prejudice to the right of action of the lessor in respect of any breach of the lessees' covenants herein contained." It will be observed that the right to re-enter for non-payment of rent and royalties only arises if such rents and royalties, or any part thereof, remain unpaid for thirty days after becoming payable, that is, thirty days after March 25 or September 29, as the case may be, and that the year for the purpose of the ascertainment of any sum required to bring the rent and royalties up to the minimum rent of 100*l.* per annum runs from March 26 in one year to March 25 in the next, and consequently the only payment due to be made on September 29 in any year is in respect of the rent and royalties accrued due since the preceding March 25. The thirty days allowed for payment of what falls due on September 29 cannot expire before October 29 in the same year, and therefore no right of re-entry can arise under the proviso for re-entry before October 29 in any year, unless there is an arrear of rent and royalties outstanding on the previous March 25 of the same year.

The material facts on the question of re-entry are these: the plaintiff Company entered into possession under the underlease and carried on business in the demised premises. In 1929 the Company was in need of money, and the defendant's mother, Mrs. Turquand, approached the plaintiff Gee and asked him to advance moneys to enable the Company to carry on. The plaintiff Gee advanced in all a total sum of 6620*l.* There is a question whether these advances were made by Mr. Gee to Mrs. Turquand or to the Company. The defendant claims that the advances were made by Mr. Gee to Mrs. Turquand, who in her turn re-advanced the moneys lent to her to the plaintiff Company. On behalf of the plaintiff it is claimed that the advances were made to the plaintiff Company, and not to Mrs. Turquand. So far as the documents go, it appears that when the first advance of 4000*l.* was made by the plaintiff Gee, in April, 1929, he was given a document dated April 15, 1929, in acknowledgment. The document is in the following terms: "I, Gertrude Turquand, of Braceborough House, Lincolnshire, hereby acknowledge to have this day received on behalf of Messrs. Braceborough Spa, Ld., the sum of 4000*l.* advanced and paid to me by G. Cecil G. Gee of 'Uplands,' Rothley, Leicestershire, as a temporary loan for Braceborough Spa, Ld., and I have deposited with Henry Wing of Stamford, agent for the said G. Cecil G. Gee, the sub-lease of Braceborough Spa as security for the above 4000*l.* and I agree on behalf of the said Braceborough Spa, Ld., to pay to the said G. Cecil G. Gee interest on the said sum of 4000*l.* at the rate of 5 per cent. per annum from the date hereof." The document is signed by Mrs. Turquand. At the same time as this document was given, the sub-lease to the plaintiff Company was in fact deposited with Mr. Gee's agent, Mr. Henry Wing, as security for the advance. After this date, Mr. Gee from time to time made further advances, the dates of which and the amounts of such further advances being noted on the documents last mentioned, and are initialed by Mrs. Turquand. These further advances were 2000*l.* on July 25, 1929, 450*l.* on September 4, 1929, and 200*l.* on September 10, 1929, the total amount of Mr. Gee's advances being 6650*l.*

It is immaterial to determine whether these advances were made to Mrs. Turquand or to the plaintiff Company, because on the assumption that the advances were made to the plaintiff Company, the charge given to the plaintiff Gee was never registered as a charge affecting the plaintiff Company as required by s. 79 of the Companies Act, 1929, and is therefore void as against the liquidators of the plaintiff Company and its creditors, including the defendant. It is, however, right to say that I am not prepared to accept the evidence of Mr. Kellow, or of the defendant, with regard to this transaction, or indeed on any other point in which there has been a conflict in this case. Each of them was an unsatisfactory and unreliable witness. The moneys advanced by Mr. Gee enabled the plaintiff Company to carry on its business and to pay some, at any rate, of its liabilities. It appears from the Company's books that the rents and royalties, due under the underlease down to March 25, 1929, were paid direct to the head landlord in discharge of the rents and royalties due down to the same date to him under the head lease, the rents and royalties reserved by the head lease being the same as those reserved by the underlease. It has been established to my satisfaction that the amount falling due to the defendant under the underlease, on September 29, 1929, was a half year's royalties from March 26, 1929, and that the amount due on September 29, 1929, in respect of those royalties was 15*l.* 5*s.* 3*d.* and no more. This is clearly shown by an account submitted to the defendant on October 4, 1929.

Certain copy letters between the defendant and Mr. Kellow were produced by the defendant for the purpose of establishing that the defendant re-entered upon the premises under the proviso for re-entry on October 24, 1929. The defendant and Mr. Kellow have given an account in the witness-box with regard to these letters which I am quite unable to accept. On the evidence before me I am prepared to hold that these letters were not written by the defendant for the purpose of determining the lease at all; but I need not go further into the matter, for it is sufficient to point out that even if the letters were written and delivered on the dates they purport to bear, there was not on October 24, 1929, a right to re-enter, and therefore any purported re-entry on that date would be wholly inoperative. The letter of October 24, 1929, is addressed to the plaintiff Company and purports to be signed by Miss Harwood. It is in these terms: "I regret to inform you that the notice respecting your tenancy of the Braceborough Spa and surrounding land, dated October 4th, 1929, has now expired and I hereby declare the sub-lease to be null and void and your tenancy of the surrounding land to be at an end. I have therefore to-day taken possession of all the said premises, but am willing to allow you to act as sole selling agents for me for Braceborough spa water without any occupation or tenancy rights entirely at my option and discretion and courtesy as to duration." A letter from the plaintiff Company signed by Mr. Kellow as secretary, and dated October 25, 1929, was produced, in which the receipt of the defendant's letter of October 24 is acknowledged. The letter goes on to express regret that the Company is unable to meet the payment for rent and royalties due, and continues: "In the circumstances we appreciate your kind offer to appoint us to act as your selling agents for the time being. May we ask you to grant us the option for six months certain, as we are sure we could pull up and pay our debts to you within that time. If we are unable to fulfil our obligations you will, of course, be at liberty to again re-enter and take entire possession."

The minutes of the plaintiff Company for November 6, 1929, contain a statement that the managing director had raised a loan of 1000*l.* to repay money due to a Dr. Pennington, and it is incredible that the plaintiff Company would have agreed at this time to the forfeiture of the lease because a sum of 15*l.* 5*s.* 3*d.* was outstanding for rent. It is the fact that no change was made in the method of keeping the books of the plaintiff Company as at October 24, 1929, and no notice of any kind with regard to the alleged forfeiture of the underlease was given by the defendant to the plaintiff Gee. It is perhaps significant that on May 29, 1930, when a distraint was levied against the plaintiff Company, the defendant gave to the Sheriff of Lincolnshire a notice in these terms: "I give you notice that the sum of 140*l.* is now owing to me from my tenants Braceborough Spa, Ld., of 37, Walbrook, in the County of London, being one year's rent in respect of the Spa house premises and land adjoining which the said company occupies at Braceborough in the County of Lincoln, and I require you not to remove the goods therein or thereupon which you have seized in execution until the said sum has been paid." The sum of 140*l.* referred to as one year's rent is the minimum sum of 100*l.* a year for the premises in the underlease for the year ending March 25, 1930, and 40*l.* rent for the same period for some adjoining land. Moreover, on June 27, 1930, the defendant put in against the plaintiff Company a sworn proof in respect of 140*l.* for "rent due from the Company to me from March 25, 1929, to March 25, 1930, as shown by the account endorsed hereon." The endorsed account includes this item: "1929, March 25th, to 1930, March 25th, To one year's rent of Braceborough Spa and premises and 7½ acres of land as per underlease, 100*l.*" But I need not pursue this matter further, for, as I have already stated, there was in fact no right in the defendant to re-enter on October 24, 1929. I hold as a fact that there was no re-entry on that date.

It is pleaded that the defendant carried on business as the proprietor of Braceborough Spa in her own name and for her personal use from March 24, 1930, and in support of this claim she alleges that on May 3, 1930, she appointed a man named Holmes, who was admittedly in the employ of the plaintiff Company at Braceborough Spa at that date, as her agent at Braceborough Spa. The letter of appointment purports to be dated May 3, 1930, and is signed by the defendant. The defendant stated in the witness-box a circumstantial story of how this letter was delivered to Holmes, and she was supported in this by Mr. Kellow. The defendant Holmes said he received the letter on June 1, 1930, and not earlier, and he is sure of this because, as it was dated May 3, 1930, he noted on it at the time of its receipt the actual date of delivery to him. The original letter was produced by him with the date on it in his handwriting: "Received June 1st, 1930." I accept Mr. Holmes's evidence in preference to that of the defendant and Mr. Kellow. I hold there was no re-entry in fact before June 1. It appears, however, that the defendant did in fact carry on the business as from June 1, and this is relied on as a re-entry under the proviso for re-entry.

By s. 146 of the Law of Property Act, 1925, it is provided that a right of re-entry or forfeiture under any proviso or stipulation in a lease for a breach of any covenant or condition in the lease shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessees a notice. This notice must comply with the particular requirements set out in the section. It is admitted that no notice of any kind was in fact served on the plaintiff Company as a step leading up to the lessor's re-entry on June 1, 1930; but it was argued that the section has no application to the underlease, because such underlease falls within one or other of the exceptions set out and provided for by sub-s. 9 of the same section. Sub-s. 9 is in these terms: "This section does not apply to a condition for forfeiture on the bankruptcy of the lessee . . . . if contained in a lease of: (*a*) Agricultural or pastoral land; (*b*) Mines or minerals; (*c*) A house used or intended to be used as a public-house or beer shop; (*d*) A house let as a dwelling-house, with the use of any furniture, books, works of art, or other chattels not being in the nature of fixtures; (*e*) Any property with respect to which the personal qualifications of the tenant are of importance for the preservation of the value or character of the property, or on the ground of neighbourhood to the lessor, or to any person holding under him." It was argued that the underlease to the Company came either under sub-head (*b*) or sub-head (*e*).

A mining lease is defined in s. 205, sub-s. 1 (xiv.), of the Act as meaning "a lease for mining purposes, that is, the searching for, winning, working, getting, making merchantable, carrying away, or disposing of mines and minerals, or purposes connected therewith." It is true that the lease provides for the payment of rent and royalties, which are to be ascertained by reference to the quantity of natural water derived from the premises and sold. It also provides for the payment of royalties on the gross receipts of the Company from the user of the premises as a bathing establishment, while the lease itself is of land and buildings.

In my judgment it is impossible to bring the underlease within the definition of "mining lease" contained in the Act. I think it is equally impossible to describe the underlease as being "of property with respect to which the personal qualifications of the tenant are of importance for the preservation of the value or character of the property." Indeed, no evidence was deduced on behalf of the defendant on which any such argument could be based, and, so far as I can judge from a consideration of the nature of the property comprised in the underlease, there is nothing to suggest that the qualifications of the tenant are of any particular importance. I hold that the underlease is one to which s. 146 applies, and consequently that there was no valid re-entry on June 1, 1930.

On June 2, 1930, an order was made for the compulsory winding-up of the plaintiff Company upon a petition presented on May 22, 1930. The commencement of the winding-up was, therefore, May 22, 1930. By s. 205, sub-s. 1 (i.), of the Law of Property Act, 1925, bankruptcy in relation to a corporation means the winding-up thereof. The liquidator of the Company, after looking into the matter, entered into possession of the property comprised in the underlease in October, 1930. As there had at this time been no valid re-entry by the defendant he was entitled to do this, and the defendant cannot complain in respect of what has been done.

The case, however, does not end here, for it is argued on behalf of the defendant that s. 146 has no application to the present case, because the requirements of sub-s. 10 of the section have not been fulfilled. This sub-section provides that, where a lease contains a condition of forfeiture on bankruptcy, and this, of course, includes winding-up in the case of a limited company, the provisions of the section shall only apply in two alternative cases. The first is if the lessee's interest is sold within one year of the bankruptcy or the winding-up, and the second is if the lessee's interest is not sold before the expiration of that year, the section is only to apply to the forfeiture condition during the first year from the date of the bankruptcy or winding-up. This sub-section does not abrogate the lessor's right to re-enter within the year, but provides that a valid notice must be served before the lease can be forfeited: see *Civil Service Co-operative Society, Ld.* v. *McGrigor's Trustee.* (1) If the lessee's interest is sold within the year, the section applies without any restriction as to time, so as to enable the purchaser's title to be confirmed by an order giving relief. If the lessee's interest is not sold within the year, then the trustee in bankruptcy or the liquidator has one year from the commencement of the bankruptcy or the winding-up within which to apply for relief.

In the present case it was claimed that the liquidator of the plaintiff Company had in fact sold the lessee's interest to the plaintiff Gee within the time limited. The sale relied on is contained in an agreement dated June 1, 1931, and

(1) [1923] 2 Ch. 347, 354–5.

made between the plaintiff Company in compulsory liquidation of the first part, the liquidator of the second part, and the plaintiff Gee of the third part. It contains a number of recitals. I need not refer to all of them; the material recitals are as follow: "Whereas before the making of the said order for the compulsory liquidation of the Company the said G. Harwood purported to determine the term of the said underlease by re-entry for non-payment of rent. And whereas the creditor and the Company have commenced an action against the said G. Harwood for a declaration that the said underlease is still subsisting and in the alternative that the Court will grant relief to the creditor and the Company from the before mentioned purported forfeiture. And whereas at the date of the order for compulsory liquidation of the Company the Company was indebted to the creditor in the sum of 6985*l.* 16*s.* 4*d.* and it has been agreed between the creditor and the Company and the liquidator that in consideration of the creditor withdrawing his proof for the said debt the Company and the liquidator will enter into the agreements hereinafter contained." Then follows an assignment of "all those their respective rights and interests to and in the before mentioned action now pending to obtain relief from the said purported forfeiture of the underlease and the right to prosecute the same. And the liquidator hereby declares that he has obtained the sanction of the Board of Trade and the principal creditors of the Company to the said assignment and to the carrying out of the other arrangements herein referred to. And the liquidator hereby agrees that he will in all respects render to the creditor all necessary information and assistance in his power as liquidator of the Company for the purpose of prosecuting the action to a successful conclusion. (2.) In further consideration of the creditor withdrawing his proof of debt against the Company and entering into the agreements on his part hereinafter contained the Company and the liquidator hereby agree that they will, subject to the consent of the said G. Harwood being obtained, or, in the event of its being unreasonably withheld, without the consent of the said G. Harwood, procure the assignment by the Company to the creditor of the residue of the said term created by the said underlease together with all the benefit thereof. (3.) In consideration of the premises the creditor has by an instrument bearing even date herewith entered into an agreement with the liquidator to indemnify him against any costs, charges, expenses and liabilities which may be incurred in the prosecution of the before mentioned action now pending to obtain relief from the said purported forfeiture of the underlease. (4.) In further consideration of the premises the creditor hereby agrees with the liquidator that he will withdraw his proof in the liquidation of the Company upon the underlease being effectually assigned to him and that he will use his best endeavours to sell the property comprised in the underlease as soon as reasonably convenient and will pay to the liquidator a sum equal to one-sixth of the proceeds of sale after deduction thereout of the creditor's solicitor and client costs and actual disbursements incidental to the investigation of the position and of and incidental to the said action and sale including any costs of the defendant to the said action ordered to be paid by the creditor or any sum of money or costs properly paid upon any compromise entered into between the creditor and the defendant and any rent paid or ordered to be paid by him as a condition of obtaining the relief asked for in the said action."

I do not think this document can properly be described as an unconditional agreement to sell the plaintiff Company's interest in the underlease. It is really an agreement which provides for the future conduct of the litigation pending between the plaintiff Company and the defendant at the expense of the plaintiff Gee, and on terms which recognize, in the event of success, a continued interest in favour of the liquidator in the premises comprised in the underlease. It is, I think, plain that, in order to satisfy the requirements of the sub-section, any sale within the year must be an absolute sale: see *Ferguson & Co.* v. *Ferguson* (1); *In re Henry Castle & Sons, Ld.* (2) Assuming, however, that I am wrong in the view I have expressed of the agreement to which I have referred, that agreement was not made until June 1, 1931, and as the compulsory winding-up order was made upon a petition presented on May 22, 1930, which is therefore the date of the commencement of the winding-up, the sale agreement was not made within one year from the winding-up, and the case therefore cannot be brought under sub-s. 10 (*a*) of s. 146 of the Law of Property Act, 1925.

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(1) [1924] 1 Ir. R. 22.

(2) (1906) 94 L. T. 396.

It is, therefore, necessary to consider the further question: Has the liquidator applied for relief from the forfeiture condition within one year from the winding-up, so as to bring the case within (*b*) of the sub-section? The writ was issued on October 23, 1930, and by it the Company by its liquidator asks in the alternative for relief from forfeiture of the underlease. The year from the winding-up did not expire until May 21, 1931, and therefore the application was in time. The fact that the action did not come on for hearing until long after this date had expired is, I think, immaterial. I hold that the case falls within sub-s. 10 (*b*), and that the provisions of s. 146 apply to the case. In my judgment the plaintiff Company is entitled to a declaration that the underlease was not determined by re-entry either on October 24, 1929, or on April 24, 1930, or on June 2, 1930, and that the plaintiff Company by its liquidator is entitled to be relieved from any forfeiture which has occurred since June 2, 1930. So far as Mr. Gee is concerned, it seems to me that he has no right of action against the Company. I will consider the terms on which the relief is to be allowed when the actual position with regard to the rent and royalties down to the present time has been ascertained.

The defendant must pay the costs of the plaintiff Company of the action down to the date of this order, and the counterclaim will be dismissed with costs.

P. J. B.

The terms on which relief was given were that the property comprised in the underlease should be assigned to the plaintiff Gee and that the arrears of rent should be paid.

The defendant appealed. The appeal was heard on February 3, 6, 7 and 28 and March 2, 1933.

Grant K.C. and *P. Gordon Bamber* for the appellant. The defendant re-entered on May 5, 1930, or at latest on June 1, 1930, for non-payment of rent. That was the effect of a letter dated April 26, 1930, by which the Company's secretary gave Holmes a week's notice to determine his employment on the ground that the Company had ceased to function and a letter dated May 5, 1930, by which the defendant took Holmes into her employment. The defendant remained in possession till October 22, 1930, when the liquidator to the Company ousted the defendant and resumed possession in the name of the Company. That was the day before he issued the writ in this action. Luxmoore J. seems to have held that there was no valid re-entry on either date, because the notice required by the Law of Property Act, 1925, s. 146, sub-s. 1, had not been given ; but that sub-section has no application to re-entry for non-payment of rent (see sub-s. 11) and therefore no notice was necessary. Relief against entry for non-payment of rent is given by the Common Law Procedure Act, 1852, ss. 210, 211 and 212, and the Common Law Procedure Act, 1860, s. 1 ; but it was indicated by Stirling J. in *Howard* v. *Fanshawe* (1) that relief would not be given after peaceful entry by the landlord, unless the action for relief was brought within six months of the entry. Here the Company has not applied for relief under those provisions but only under the Law of Property Act, 1925, s. 146, and it is now too late to do so. At the latest the re-entry was made on June 1, 1930, when Holmes said he in fact received the two letters.

If, however, the Court does not accept the view that there was a valid re-entry for non-payment of rent, the question still remains whether a forfeiture did not occur as a result of the winding-up order made against the Company on June 2, 1930, which cannot now be relieved against. That depends on the construction of s. 146, sub-s. 10. Under

(1) [1895] 2 Ch. 581, 589.

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s. 14 of the Conveyancing Act, 1881, no relief was given in such a case, but s. 2, sub-s. 2, of the Conveyancing Act, 1892, gave the trustee in bankruptcy of an individual or the liquidator of a company a year within which to find a purchaser. That sub-section is now represented by s. 146, sub-s. 10, of the Act of 1925 which though in terms only referring to "bankruptcy" includes by virtue of s. 205, sub-s. 1 (i.), a winding-up of a corporation; and its effect is to make sub-s. 1, under which notice is required before a right of re-entry is exercised, and sub-s. 2, under which a lessee is given the right to apply for relief (*a*) applicable if the lessee's interest is sold within a year, and (*b*) applicable during the first year from the commencement of the bankruptcy or winding-up, if the lessee's interest is not sold within that year. In the present case there was not a sale within the year, and it is sub-cl. (*b*) which has to be construed. The effect of that sub-clause is that the lessee can only obtain relief during the year and that the relief given cannot extend beyond the year. The lessee must sell within the year if the relief is to extend beyond that period. Here the relief was not obtained within the year, although it was applied for within the year. But even if the relief had been obtained within the year, it would have ceased at the end of the year in the absence of a sale. If this were not so, a lessor would be put in a very unfair position in being saddled with an impecunious tenant for an indefinite period: see *Civil Service Co-operative Society, Ld.* v. *McGrigor's Trustee* (1), where the construction of s. 2, sub-s. 2, of the Act of 1892 was considered.

Again if, as has already been contended, the defendant had obtained peaceful possession before June 2, 1930, for non-payment of rent, then when the Company went into liquidation, relief could not be obtained against the defendant because she was already in peaceful possession: *Rogers* v. *Rice.* (2)

[ROMER L.J. That can only be where the landlord has properly re-entered.]

(1) [1923] 2 Ch. 347.

(2) [1892] 2 Ch. 170.

The re-entry for non-payment of rent was quite proper. When once a landlord is in possession the Court cannot grant relief under s. 146 of the Act of 1925 and will not do so under its equitable jurisdiction. The effect of a peaceable entry is that the landlord is in of his own estate and the lease is at an end.

[ROMER L.J. There is power to revive the lease under the Common Law Procedure Acts.]

Yes, but as soon as the Company went into liquidation, the landlord was entitled to retain possession on account of the forfeiture thus caused. It follows that on this ground also relief could not be properly given.

Upjohn K.C. and *Harold Christie* for the respondents. Luxmoore J. has held that the underlease was not determined by re-entry on or before June 2, 1930. It is in fact clear that there was no re-entry on May 5, and the allegation in the defence, which in making a claim to forfeiture must be strictly adhered to, only alleges a re-entry on October 24, 1929, an allegation which has now been abandoned. In fact all the evidence shows that the defendant did not re-enter on October 24, 1929, but arranged that the Company should carry on business as selling agents. She subsequently sought to determine by the letters of April 24 and May 5, 1930, from which time she claimed to be trading on her own account. Even if that were so, nothing that happened before June 2, 1930, would amount to a re-entry for non-payment of rent. Where the condition is, as here, that the landlord may re-enter he must actually re-enter or he must do that which is in law equivalent to re-entry—namely, bring proceedings for ejectment: *Fenn* v. *Smart* (1); *Jones* v. *Carter* (2); *Serjeant* v. *Nash, Field & Co.* (3); *Moore* v. *Ullcoats Mining Co.* (4)

[LORD HANWORTH M.R. referred to *Elliott* v. *Boynton*. (5)]

In fact the letters of April 24 and May 5, 1930, were not handed to the Company's employee Holmes by Kellow until June 1, 1930, and the defendant's letter to the Sheriff of

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(1) (1810) 12 East, 444, 448.

(2) (1846) 15 M. & W. 718, 725.

(3) [1903] 2 K. B. 304.

(4) [1908] 1 Ch. 575, 587.

(5) [1924] 1 Ch. 236.

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Lincolnshire dated May 29, 1930, makes it abundantly clear that the Company was in possession as her tenant up to that date. It is impossible after that letter for the defendant to say that Holmes had been her servant since May 3 through whom she had obtained possession of the property. If the letters were only delivered on June 1 it is obvious that Holmes could not have become an employee of the defendant till after the Company went into liquidation. The whole position is that after presentation of the winding-up petition the defendant was doing what she could to preserve the property for herself and to deprive the Company's other creditors of this valuable asset. Moreover such an act as entry cannot be accomplished by merely handing to an employee of the Company a letter saying that the landlord appoints him her agent.

The only question that remains is whether the plaintiffs were entitled to relief, and that turns on the construction of s. 146, sub-s. 10, of the Act of 1925. No point has been taken in this Court by the appellants in regard to sub-s. 9. The effect of sub-s. 10 (*a*) is to give the liquidator a year to dispose of the property and, if he does so, the provisions in sub-ss. 1 and 2 apply. The sub-section does not abrogate the right of the landlord to enter within the year, but he must first give notice under sub-s. 1, and the relief can be applied for under sub-s. 2. If, however, the year expires and the liquidator has neither applied for relief nor sold the property the effect of sub-s. 10 (*b*) is that sub-ss. 1 and 2 no longer apply. Here, however, the liquidator applied for relief within the year, and it is immaterial that his application was not heard within the year. It is the date of application and not the date of the hearing that is material: compare *Lewis* v. *McKay* (1) and *Diment* v. *Roberts*. (2)

[LAWRENCE L.J. What right had the liquidator to apply for relief under s. 146, sub-s. 2? Was the lessor "proceeding, by action or otherwise, to enforce . . . . a right of re-entry"?]

The defendant has done her utmost otherwise than by action to obtain possession, and was doing so right down

(1) [1924] 2 K. B. 136.

(2) [1925] 1 K. B. 9.

to the date when these proceedings were commenced. She was not only trying to take possession but purporting herself to carry on the Company's business on the premises. But in any case it is submitted that it is not a condition precedent that the landlord should be proceeding by action or otherwise to enforce her right of re-entry.

[They also referred to *Lock* v. *Pearce* (1) and *In re Keystone Knitting Mills' Trade Mark.* (2)]

Grant K.C. replied.

LORD HANWORTH M.R. On September 10, 1928, Miss Gwendoline Harwood granted an underlease to Braceborough Spa, Ld., a company whose registered office was in Hanover Square and who were called the lessees. The underlease contained a power whereby, if the rents or royalties were unpaid for thirty days or if the premises were not used for twelve months or if the Company should go into liquidation otherwise than voluntarily, then and in any of those cases it should be "lawful for the lessor at any time thereafter, upon the demised premises or any part thereof in the name of the whole to re-enter and thereupon this demise shall absolutely determine but without prejudice to the right of action of the lessor in respect of any breach of the lessees' covenants herein contained." That clause is a well known clause only varying in some small particulars from many others that are common form; and I think that Mr. Upjohn is right in his argument that the provision that thereupon this demise shall absolutely determine indicates that some act had to be done in order to show that the landlord had elected to determine the existing demise. This brings into play the principle laid down in *Elliott* v. *Boynton* (3), founded upon the cases there cited, including *Jones* v. *Carter* (4), that there must be an affirmative act which definitely shows, by the issue of a writ or in some other way, that the landlord is determined to enforce the rights given to him under this power of re-entry.

The action was commenced on October 23, 1930, and the plaintiffs sought in the action a declaration that the underlease was still subsisting and that the Company was entitled to retain possession and, in the alternative, relief from any forfeiture of the underlease on payment of the rents and royalties. By the defence and, again, by the counterclaim the defendant, Miss Gwendoline Harwood, sought to say that the underlease was not in existence but was determined in October, 1929, or on June 2, 1930, and she asked for a declaration that the underlease was determined, an order that the premises should be immediately delivered to the defendant, an account and any consequential relief. There was a defence to that counterclaim.

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(1) [1893] 2 Ch. 271.
(2) [1929] 1 Ch. 92.
(3) [1924] 1 Ch. 236.
(4) 15 M. & W. 718.

The learned judge made an order by which the Court declared that the underlease "was not determined by re-entry either on or before the 2nd June, 1930, and is still subsisting" and ordered "That the plaintiff company be relieved from any forfeiture of the said underlease incurred by reason of the liquidation of the plaintiff company" on certain terms.

From that decision an appeal is brought to this Court. First of all, it is said that there was a re-entry on the premises by Miss Harwood, whom I will call the landlord. Originally it was claimed that that had taken place in October, 1929, but, for obvious reasons, that could not be adhered to. It was then claimed that there was a re-entry in April or, at the latest, in June, 1930. The learned judge has believed the evidence advanced on behalf of the plaintiffs and has not accepted the evidence advanced on behalf of the defendants. I am satisfied from the documents that he was right in holding that view. Indeed, I go further, for to my mind the effort that was made on the part of the defendant to establish that certain acts had taken place in May was ill-founded, to say the least, and was one in which the true facts were not presented by her to the Court. The learned judge has held that two letters of great importance dated April 26 and May 3, 1930, addressed to Mr. Holmes, who was employed at Braceborough Spa, were not in fact received by him until Sunday, June 1.

For the purpose of this judgment I will quite shortly summarize the facts, which are fully stated by the learned judge. It appears to me quite hopeless for the defendant to contend that there was ever a re-entry as the result of anything that took place in April or May, 1930, and that the lease had been determined for non-payment of rent before June. I say that for reasons which to my mind are cogent and which are to be found in two or three letters to which our attention has been called. There was a petition presented to wind up the Company on May 22, and on that date notice was given by Mr. Hatfield, of Hatfield, Dixon & Co., who were accountants, to Mrs. Turquand, the mother of Miss Harwood, in these terms: "The procedure is that unless you can come to a settlement in this case, your company will be automatically placed in compulsory liquidation and the assets sold for the benefit of your creditors, so the matter is urgent and you should take immediate steps to safeguard yourselves." In consequence a letter and notice was given to the Sheriff of Lincolnshire, who had levied execution upon the premises of the Company, by Miss Harwood's solicitor on May 29, 1930: "Please note that my client, Miss G. Harwood, of Braceborough House, Braceborough, has a claim for more than one year's rent against Braceborough Spa, Ld., the defendants in the action in which you have levied execution. Upon delivery of this letter to you formal notice will be served upon you." The notice is in these terms: "I give you notice that the sum of 140*l.* is now owing to me from my tenants Braceborough Spa, Ld., of 37, Walbrook, in the County of London, being one year's rent in respect of the Spa House premises and land adjoining which the said company occupies at Braceborough in the County of Lincoln and I require you not to remove the goods therein or thereupon which you have seized in execution until the said sum has been paid." That was done on May 29, 1930, and it was a formal step taken with the advice of Miss Harwood's solicitor; and, to my mind, it is quite impossible for Miss Harwood to claim that at that time the lease had been brought to an end and determined.

It is perfectly plain that she was claiming the rent due on March 25 on the basis of the underlease standing at that time, and the notice refers to the Company as occupying the premises at Braceborough Spa. Nothing whatever is said, either in the letter or in the notice, of the fact, as now claimed, that Miss Harwood had gone into possession in April or early in May, as suggested by the letters delivered to Mr. Holmes on Sunday, June 1. It may be, as Mr. Grant says, that certain documents in evidence are accounts showing moneys received and paid out in connection with the Braceborough Spa by Miss Harwood. Exactly how and in what character those moneys were received or paid out, I do not stop to inquire; but I am quite satisfied that the mere fact of their receipt and payment does not establish the fact that in law or, indeed, in fact Miss Harwood had gone into possession and brought the underlease to an end under the forfeiture clause. It is sufficient to call attention to the documents passing on May 29 to establish that up to that time Miss Harwood had not either in fact or in law put an end to the underlease. The two letters delivered on Sunday, June 1, are to my mind deceitful letters. They purport to indicate that Braceborough Spa, Ld., had ceased to function in April. The letter of April 26 says: "I regret that owing to the Braceborough Spa Company, Ld., now having ceased to function, I have to tender to you one week's notice to terminate your engagement from this date." This was intended to show that Braceborough Spa, Ld., was not then functioning and had forfeited the underlease. This letter, which with that of May 3 was delivered to the resident man, Holmes, on June 1 purports to give him notice; and having regard to the true date of delivery it could only take effect as from that date so as to determine his position one week later and not before.

On June 2 the order was made to wind up the Company, and the title of the liquidator would date back to May 22, when the petition was presented. It follows that on Monday, June 2, when the liquidator was authorized by the Court to conduct the liquidation, there had been no entry upon the premises, no determination of the underlease, and after the liquidator was appointed the letters could not operate to determine the underlease.

It is said, however, that during the period of time from June until October there is some evidence of Miss Harwood having re-entered. In particular reliance is placed by Mr. Grant on a letter of January 24 in which the liquidator said: "It should be quite obvious that any harm which has been done in the last three months to the interests of your client, Miss Harwood, owing to my possession of the Spa premises, is entirely due to her own action. Her possession of the premises was not disturbed until October, 1930, when the proceedings referred to were launched." It is argued that, in the circumstances indicated by that letter, it cannot be said that, when the proceedings were commenced, Miss Harwood was attempting by action or otherwise to enforce a forfeiture. I do not so read that letter and I attach great importance to some of the letters to which I have referred in the course of the argument and, in particular, to a letter of August 12, in which the liquidator says: "On the 6th June, 1930, I received a letter from your client stating that she re-entered into possession of the Spa property on the termination of the sub-lease held by the company from her in consequence of the non-payment of rent." Then he sets out some other facts, and adds: "You are probably aware of the relationship between the parties concerned and of the unsatisfactory nature of the whole of the circumstances."

I turn back to the letter of June 6, which contains the statement referred to in the letter of August 12. It says: "I beg to inform you that I re-entered into possession of the above premises and surrounding land and fixtures thereon on the determination of the sub-lease held by the late company from me, in consequence of the non-payment of rent due to me thereunder." That was certainly an inaccurate statement, because she had not re-entered; but, at any rate, it was a claim that she had a right at that time to be in possession. It was not acquiesced in by the liquidator, but this lady was undoubtedly asserting a right to possession from some date in June down to the time when she was dispossessed by the liquidator and the proceedings were commenced on October 23.

What is the upshot of that in law? It really means that there had been no determination of the underlease under the forfeiture clause before the liquidator was appointed, but by reason of the appointment of the liquidator there was a right to forfeit. What then is the date at which she asserted her right to possession? It seems to me to be June 6.

Then comes the question whether the Company is entitled to relief from forfeiture. In the Conveyancing Act, 1881, no relief was given against the right of re-entry on bankruptcy, that being a case in which the operation of s. 14 was expressly excluded by sub-s. 6; but by s. 2, sub-s. 2, of the Conveyancing Act, 1892, it is provided that sub-s. 6 of s. 14 of the Act of 1881 "is to apply to a condition for forfeiture on bankruptcy of the lease, or on taking in execution of the lessee's interest only after the expiration of one year from the date of the bankruptcy, or taking in execution, and provided the lessee's interest be not sold within such one year." The effect of that sub-section, stated affirmatively, was to bring a right to relief from forfeiture on bankruptcy within s. 14 of the Act of 1881 under circumstances limited in time as expressed in the sub-section. The sub-section then went on to provide: "but in case the lessee's interest be sold within one year, sub-section six shall cease to be applicable thereto." When s. 146 of the Law of Property Act, 1925, was passed, the limitation of the right of relief to the period of a year when there was no sale, and the right to relief, unrestricted in point of time, when there was a sale within a year was set out in two sub-clauses. I need not read sub-s. 10 of that section; but I think it is easier to understand it if one considers what is its purpose and if one transposes sub-clauses (*a*) and (*b*). It may often happen in the case of a liquidation that the company may be in possession of a lease which is of saleable value. It may not be easy to disentangle the affairs of the company or to ascertain the rights within a short time, and still less may it be possible to effect a sale of the lease within a short time; and, as I read the sub-section, its purpose is to give a twelve months' period during which the liquidator can apply for relief and, further, in the case where there is a sale effected (it may be towards the end of the twelve months' period), to insure that the liquidator should not find himself brought up against a time limit which would imperil the success of his realization of the assets. I think, therefore, that Russell J., as he then was, rightly interpreted in *Civil Service Co-operative Society, Ld.* v. *McGrigor's Trustee* (1) the provisions for which s. 146 is substituted. I will not repeat his words, but to my mind they give the correct interpretation of these provisions. An affirmative right to relief is given to the liquidator during the period of twelve months and, if there is a sale, right to relief can still be obtained subsequently; but it is clear that when there is no sale within the year relief must be obtained within that period.

The words of s. 146, sub-s. 2, are: "Where a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture, the lessee may, in the lessor's action, if any, or in any action brought by himself, apply to the court for relief." It appears to me that, if I accept the construction suggested by Mr. Grant, this right to apply is given only in a case where the lessor is proceeding by action or otherwise to enforce his right of re-entry; but assuming that the right of the lessee to apply is limited to such cases, I think that the lessor in this case was proceeding by what may be called methods other than action to enforce her right of re-entry or forfeiture. I come to this conclusion from the facts I have stated, which lead me to think that as from a date in June—preferably I should say from June 6 onwards—she was attempting to enforce her right to re-entry or forfeiture.

That being so, the right arose on the part of the lessee, Braceborough Spa, Ld., in an action brought by itself to apply to the Court for relief, and during the period of twelve months from the liquidation—namely, on October 23, 1931, the lessee did by action apply to the Court for relief.

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(1) [1923] 2 Ch. 347, 354.

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It is said, however, that the relief must be not only applied for but also granted within the time limit of twelve months. I do not so hold. I think that when once the initial step of commencing the proceedings has been taken, the reasoning which is to be found in *Diment* v. *Roberts* (1) in the Court of Appeal, as well as in the judgment delivered by Swift J. on behalf of the Divisional Court, applies in the present case. I quote some words from my own judgment (2): "It is impossible to suppose that the Legislature intended to leave the tenant to the chance of his right to recover falling within the area of a very busy court, or to be determined by the changes or chances of the court's business. I think the object of the Act was to maintain the right of the tenant or mortgagor, but at the same time to impose some limit on the time for taking proceedings." The same reasoning applies to the present case. All that could be done or ought to be done by the lessee had been done by October 23 within the limit of twelve months.

It is contended, however, that it is hard upon the landlord that such a matter should be left open and indeterminate during the months that may elapse, or in the present case during the very considerable time that did elapse before the matter came before Luxmoore J. for determination. There is no doubt weight in that observation; but the difficulties which arise from the delay can really be met and are intended to be met by the wide discretion given to the learned judge as to the terms on which relief should be given. Let it be remembered that the basis on which relief is given is that there is still an existing lease, but one in respect of which the danger of forfeiture and determination has been incurred. It is not hard upon the landlord if that lease is held to continue, for all that has happened is that he has not by the events that have occurred secured the right to enforce a forfeiture; and, if the relationship of landlord and tenant is to continue, it is not difficult to adjust their rights in fixing the terms on which relief should be given. It appears to me that the difficulties and possible hardships which may arise

(1) [1925] 1 K. B. 9.

(2) Ibid. 11.

from treating the relief as still available and as being given from the date of the writ are such as can be fully met by the terms on which relief is given.

For these reasons, in addition to those which have been given by Luxmoore J., I have come to the conclusion that the judgment is right and that the appeal must be dismissed with costs.

LAWRENCE L.J. I agree. In view of the evidence which was given in the Court below and of the judge's findings, I think that in bringing this appeal the appellant has taken a bold step. It appears that the appellant, after a winding-up petition had been presented and brought to her notice, conspired with one Kellow to defraud the creditors of the Company and then attempted to deceive the Court by endeavouring to uphold what she and Kellow had done. After May 22, 1930 (the date of the presentation of the petition), the appellant and Kellow concocted two letters: one purporting to be dated April 26, giving a week's notice to Holmes, the sub-manager at the business premises, terminating his employment; the other purporting to be dated May 3, after the week's notice had expired, re-engaging Holmes as her employee. Both those letters were handed to Holmes on Sunday, June 1, the day before the hearing of the winding-up petition. No wonder Holmes was puzzled and wrote on each of the letters the date on which he received it. Fortunately for the liquidator, Holmes was not a party to the conspiracy and told the Court that the letters had been handed to him by Mr. Kellow on June 1. The appellant attempted to defraud the creditors of the Company, as well as to deceive the Court, because the letters were concocted with a view to establishing that she had effected a re-entry on the premises before the commencement of the winding-up proceedings and had, therefore, withdrawn the leasehold interest which the Company in fact owned from the assets in the winding-up. The appellant asked this Court to reverse the finding of the learned judge; for myself, I decline to do anything of the kind. In my opinion the finding that there was no re-entry before the winding-up, was not only fully justified but, in view of the evidence, inevitable.

There only remains the question of law which has been raised under s. 146, sub-s. 10, of the Law of Property Act, 1925. That sub-section reproduces in substance the provisions of s. 2, sub-s. 2, of the Conveyancing Act of 1892. Without reading sub-s. 10 again, I think that the true effect of it is to give the liquidator of a company which has been ordered to be wound up one year within which to deal with the leasehold property of the Company. During that year he is entitled to rely upon sub-ss. 1 and 2 of s. 146, with the result that before the landlord can enforce a forfeiture he has to serve a notice on the company under sub-s. 1, and the liquidator under sub-s. 2 has the privilege of applying to the Court for relief. If there is a sale the liquidator can pass on the benefit of s. 146 to the purchaser, in which event the purchaser has the benefit of that section permanently, and the landlord cannot enforce a forfeiture as against him without giving notice under sub-s. 1, and he then has the right to ask for relief under sub-s. 2.

It is said by the appellant in this case: Be it so: but the liquidator must obtain relief, if at all, within the first year of the winding-up unless there is a sale within that year. In my opinion that contention is not well-founded. In the present case I will assume that there was no sale within the first year. The application for relief, however, under sub-s. 2 was made within a year from the winding-up, and in my judgment, on the authority of the cases cited by Mr. Upjohn —namely, *Lewis* v. *McKay* (1) and *Diment* v. *Roberts* (2), it is sufficient for the person seeking relief to claim that relief by proceedings commenced within the year, although the relief may not be actually obtained during that year; and, therefore, as the proceedings in the present case were commenced on October 24, they were instituted in time to obtain relief.

The last point made by the appellant was that the liquidator may be entitled to apply for and obtain relief within the

(1) [1924] 2 K. B. 136.

(2) [1925] 1 K. B. 9.

year, but the Court can only grant him relief during that year; in other words, that the Court is powerless to grant any relief under sub-s. 2 beyond the year, unless the property is sold within the year. I can find nothing in the Act to limit the right of the Court to grant relief in that way. The provisions of the section are to apply during the first year, and consequently the Court may grant relief under sub-s. 2 when a proper application for such relief is made to it on such terms as it thinks fit. As I have already stated, under sub-s. 10 the liquidator is entitled to take advantage of sub-s. 2 for one year, and if he does so the Court has power to grant relief against forfeiture by reason of the liquidation of the company on such terms as it thinks fit. The power of the Court in such a case is not limited to granting relief for the remainder of the year, and the Court can grant relief generally on any terms it thinks fit. Mr. Grant contended that this could not have been the intention of the Legislature, because the Court never grants relief by ordering a fresh lease to be executed to a trustee in bankruptcy or to a liquidator. It is true that the Court does not generally grant that form of relief, but it may very well be that there are other circumstances in which relief may be granted to a trustee in bankruptcy or to a liquidator where, for instance, the trustee or liquidator finds a solvent person—it may be one of the creditors of the bankrupt or company—who is willing to become responsible for the rent and the covenants in a fresh lease for the benefit of the assets in the bankruptcy or winding-up without having purchased the benefit of the lease for himself. Of course, every case must depend upon its own circumstances. I am only concerned to express my disagreement with the view urged upon us that the Court is confined to granting relief for one year only in cases where there has been no sale of the property within the year.

For these reasons I agree that this appeal fails and ought to be dismissed with costs.

Romer L.J. I agree, and have very little to add. It is perfectly plain that there was no re-entry by Miss Harwood before June 1. Apart from the fact that there is no evidence worthy of belief that established such a re-entry, the notice served by her on May 29 on the Sheriff for Lincolnshire is perfectly conclusive on the matter. She there refers to the Company as her tenants and as occupying the property at that time. There is no doubt, however, that about that time she and Mr. Kellow, the secretary of the Company, were plotting together and were taking proceedings to effect a re-entry otherwise than by action. The proceedings consisted in the concoction of a number of fraudulent letters, including two letters purporting to be dated May 3 and April 26 which have already been referred to by the Master of the Rolls and which, as stated by him, were in fact served upon Mr. Holmes on Sunday, June 1. It is difficult to see how a notice determining the employment of an assistant manager and water bottler of a lessee, coupled with a notice from the lessor purporting to appoint that assistant manager her agent for the purposes of carrying on the business, can amount at law to a re-entry upon the demised premises. It is perfectly plain that there was no re-entry on Sunday, June 1. It is said, indeed, by Mr. Grant that the fact that she had re-entered at an earlier date was made plain by a reference to her bank pass-book. That pass-book shows payments for the benefit of the Company on May 5, and I have no doubt that she was quite willing and anxious to make payments for the benefit of the Company at that date. It also shows that with the assistance apparently of Mr. Kellow she was from that date possessing herself of certain of the income of the Company, but we know that she had not taken possession at that date and, therefore, those payments, even though continued after June 1, are no evidence that she re-entered on June 1. Unfortunately for her, Mr. Holmes, the assistant manager, was a truthful and honest person and he has been, I am afraid, from her point of view, the stumbling block in the way and has defeated the conspiracy. He tells us, and he is a witness whose evidence was accepted by Luxmoore J., that there was no change in the management of the business down to the time when the official liquidator took possession. Of course, after that time the landlord could not re-enter without getting the leave of the Court and without bringing the fact that she was re-entering to the knowledge of the official liquidator. She, therefore, had not re-entered by June 2. The fact that she may have purported to re-enter on June 6 is immaterial, except in so far as it shows that the attempt to re-enter, started somewhere towards the end of May by the concoction of these letters, was still going on so that she was proceeding otherwise than by action to enforce the condition of forfeiture on liquidation.

It only remains to deal with s. 146. It seems to me perfectly plain, reading clauses (*a*) and (*b*) of sub-s. 10 of that section together, that during the first year of the liquidation sub-ss. 1 and 2 of s. 146 apply and the lessee has the protection afforded by that section. Whether that protection continues after the year depends upon whether or not the liquidator has disposed of the leasehold premises in the meantime.

It was said by Mr. Grant that, where a liquidator applies during the first year, the Court can only grant relief over the first year; that is to say, the Court can only grant relief against the landlord re-entering during that first year. I do not so read the section. Sub-s. 10 does not say that relief shall be given only for the first year, but that the section shall apply during the first year. When once the section applies, complete protection can be afforded to the lessee. Here proceedings were started by the lessee in October, 1930, well within the year after the commencement of the liquidation. It is said that the landlord was not at that time proceeding by action or otherwise to enforce the forfeiture. Whether it is necessary to show that as a condition precedent to any action on the part of the lessee, it is not necessary to determine, because the proceedings other than by action, which were commenced at the end of May, were being pursued by the defendant and ably pursued, though ineffectually, right down to the time when the liquidator very properly, as I think, turned her out of possession.

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That being so, all that the learned judge had to do was to consider on what terms he should grant relief, because I agree with the other members of the Court that, the writ having been issued within the year, the judge's powers are not limited by the fact that he was unable to hear the action and make the order within the year. He had to consider what terms he should impose as a condition for relieving against the forfeiture. He has, as it seems to me, imposed very proper conditions in the circumstances. Of course, the landlord has to be protected as well as the tenant. Where a liquidator applies at the beginning of the liquidation because the landlord is threatening then and there to re-enter, the Court will afford the fullest protection to the liquidator, even though he is not at that moment in a position to say that he has found a purchaser ready to buy the property. What conditions the Court would impose in such circumstances it is not necessary to consider, but they would be proper conditions to protect the liquidator against a forfeiture of the asset which he would naturally be seeking to dispose of within the year. It is asked by Mr. Grant what would happen if the liquidator applied for relief on the last day of the year. If a liquidator who had not succeeded in selling a property and had made no attempt to sell within the year were to come on the three hundred and sixty-fourth day and ask for relief against forfeiture, I have little doubt as to what the judge would do. The landlord could in such a case safely rely upon the Court's exercising a proper discretion in the matter.

Appeal dismissed.

Solicitors: *Tatton, Gaskell & Tatton; Stafford Clark & Co., for Ironside & Co., Leicester.*

H. C. G.

In re RUSSIAN BANK FOR FOREIGN TRADE.

MAUGHAM J.

1933

Jan. 16, 25, 26, 27, 31; *Feb.* 1, 22.

[10789 of 1932.]

Company — Winding-up — Russian Company — Branch in England— Unregistered Company—Dissolution in Russia—No Communication by Russian Government with Branch in England—Petition to Wind Up— Petitioner's Debt Disputed—Jurisdiction—Companies Act, 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *ss.* 337, *para.* 3; 338, *sub-s.* 1, *para.* (*d*).

By s. 337 of the Companies Act, 1929: ". . . . the expression 'unregistered company' shall include . . . . any company with the following exceptions:—. . . . (3) a . . . . company which consists of less than eight members and is not a foreign . . . . company."

By s. 338, sub-s. 1, para. (*d*): "The circumstances under which an unregistered company may be wound up are as follows:—(i) If the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding up its affairs; (ii) If the company is unable to pay its debts; (iii) If the court is of opinion that it is just and equitable that the company should be wound up."

The bank was established in Russia in 1871 as a limited company and was authorized by its statutes to open branches in Russia and elsewhere, which it did in, among other places, London and Paris. In 1909 it began business in London, filed particulars with the Registrar of Companies, and registered the names and addresses of persons authorized to accept service in England on its behalf. The bank at all material times consisted of more than eight members. The petitioner claimed to be a creditor for over 23,000*l.*, and asked that the bank should be wound up. Expert evidence for him expressed the view that the bank had ceased to exist as a result of decrees made under the laws of the Union of Socialist Soviet Republics, which decrees had transferred its assets to the Soviet Government, and that payment could not be demanded from any person or body of persons. The petitioner's debt was disputed and the bank opposed the petition on the ground, also supported by expert evidence, that it could not have ceased to exist as long as it had, as it claimed to have in London and Paris, branches with which the Soviet Government had not dealt and which it had not taken over. Pursuant to an order of the Registrar the petition had been served upon the persons registered as authorized to accept service in England, and no question was raised before the Court as to the validity of the service:—

Held, (1.) that the result of the Russian revolutionary legislation of 1917 and the following years was to put an end to the juristic existence of banking companies incorporated in Russia, including those which had branches established in England:

(2.) that, apart from that conclusion, the impossibility of a branch of such a Russian bank continuing to function according to its incorporating statutes was a sufficient ground for a winding-up order:

(3.) that such an order might be made even if the debt of the petitioning creditor was in dispute:

(4.) that the Soviet decrees could not have the effect of extinguishing or transferring debts regarded in English law as being locally situate in England:

(5.) that the Court's jurisdiction was not affected by the circumstance that the Soviet Government which, up to the date of the judgment on the petition, had not intervened, might possibly establish a claim to some part of the assets.

In re Russian and English Bank [1932] 1 Ch. 663 followed.

Aksionairnoye Obschestvo A. M. Luther v. *James Sagor & Co.* [1921] 3 K. B. 532 and *Morgan* v. *Larivière* (1872) L. R. 7 Ch. 550; (1875) L. R. 7 H. L. 423, considered.

PETITION.

This was a petition by a person whose debt was disputed to wind up the Russian Bank for Foreign Trade, which was incorporated in Russia in 1871, was authorized to open branches in Russia and elsewhere, began in 1909 to carry on business in London, and was an unregistered company within s. 337 of the Companies Act, 1929.

The following statement of the facts is taken substantially from his Lordship's considered judgment:—

This is a petition presented by one Phillip Zinn, who claims to be a creditor for 23,000*l.* and upwards, for the compulsory winding-up of the Russian Bank for Foreign Trade, which I shall call "the bank." The bank was established in Petrograd—then St. Petersburg—under the laws of the former Empire of Russia in 1871 as a company with limited liability under statutes to which I shall have to refer. The main object of the bank was to carry on business as bankers, to discount Russian and foreign bills, and to act as agents for customers in the purchase and sale of goods. The capital of the bank, originally 7,500,000 roubles, ultimately amounted to 60,000,000 roubles divided into 240,000 shares of 250 roubles each. The principal place of business was St. Petersburg; but the bank was authorized by its statutes to open branches elsewhere, and branches were in fact opened amongst other places in London and Paris.

The bank commenced to carry on business at 61 and 62 Gracechurch Street, London, in the year 1909, and on

February 5, 1909, the requisite particulars with regard to the bank under s. 274 of the Companies (Consolidation) Act, 1908, were filed with the Registrar of Companies. That section requires those particulars to be filed by every company incorporated outside the United Kingdom which establishes a place of business within the United Kingdom. The names and addresses of persons in this country authorized to accept service on behalf of the bank were registered with the Registrar of Companies. The petition has been served upon those persons pursuant to an order of the Registrar, and no question has been raised before me as to the validity of the service. The bank carried on its business in London and elsewhere and incurred a number of debts in this country, and is said to have considerable assets in this country. Counsel instructed by the persons de facto carrying on the London branch of the bank appeared before me on behalf of the bank and opposed the petition. At all material times, at any rate before December 14, 1917, the date of a decree on the nationalization of banks, the bank consisted of more than eight members.

The Court's findings with regard to the Russian revolutionary legislation and the bank's position are fully set out in his Lordship's considered judgment.

D. B. Somervell K.C. and *H. S. G. Buckmaster* for the petitioner and a supporting creditor. In *Lazard Bros. & Co.* v. *Midland Bank, Ld.* (1), the Court of Appeal held that, on the evidence with regard to the Russian decrees as to Russian corporations, and of Russian lawyers as to the effect of those decrees, the Moscow Industrial Bank, which was domiciled in Russia, had ceased in 1930 to exist as a juristic person: and Lord Wright, delivering a judgment, in which the other learned Lords concurred, dismissing an appeal from the decision, made it clear that the effect of foreign law must be decided by the judge on the evidence in each case. That appeal is not yet reported. In *Russian and English Bank* v. *Baring Brothers & Co.* (2) the point was not taken that is taken in the present case—namely, that as the decrees of the Soviet Government have dissolved the bank the bank's debt to the petitioner has become a debt to the Russian State Bank, with the result that, as the Soviet Government is now entitled to take over the assets of the London branch, the Court has no jurisdiction to make a winding-up order. In that case Eve J. said: "The question is whether on the happening of that event," (i.e., the dissolution of the bank as a company under Russian law) ". . . . the corporators interested in the administration of the assets pertaining to the English branch of the bank, or any survivors of those to whom the bank had committed the supervision or management of the affairs of the English branch, could continue to use the name of the bank as plaintiffs in an action for the recovery of moneys alleged to form part of such assets. But for a passage in Lord Finlay's speech, in *Russian Commercial and Industrial Bank* v. *Comptoir d'Escompte de Mulhouse* (1), I should have thought that the question was incapable of any but a negative answer." The learned judge later quoted the passage, which is as follows: "It must never be forgotten that here we have to deal with a branch of the bank established and carrying on business in this country. Even if it had been demonstrated that the Russian Bank had, so far as Russia was concerned, ceased to exist, I should not treat that as decisive in this case. The London branch has existed for a long time, it has carried on business here, there are many English shareholders, liabilities to British subjects have come into existence. It carries on business here now just as the French branch does in Paris. To affirm the defence set up by the defendants in the present case would be to make it impossible for the branch to get in its assets and discharge its liabilities. In all fairness the branch must have the right to use the name of the bank for the purpose of getting in its assets. If there is any other body or person having a preferential right to these securities a claim may be made in the winding-up in this country. But it is clear that the Comptoir d'Escompte de Mulhouse, having been paid the 1,090,000 marks, has no right to retain the securities too; the securities should be returned to the London branch by which they were lodged and which is suing in this action for their recovery, having paid off the debt." Having quoted that passage, Eve J. said: "I cannot find that statement or any similar one in any of the other speeches, and I do not think there is any authority to support it. . . . . Lord Wrenbury, after stating that, had he thought the Soviet decrees effective to extinguish and determine altogether the existence of the Russian Corporation, there would have emerged another question . . . . went on to suggest that, notwithstanding the death of the foreign corporation, there might possibly survive an association or partnership of natural persons whose relations inter se are to be found in the articles of association of the company, and are to be ascertained no doubt with reference to the lex loci contractus continuing for the purpose of winding up the company's affairs so far as this country had control over the persons and the assets within its jurisdiction. I venture to think these suggestions would hardly have been necessary had he shared Lord Finlay's view that an action to recover assets could be established and maintained in the name of the defunct foreign corporation."

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(1) [1932] 1 K. B. 617.

(2) [1932] 1 Ch. 435, 440, 441, 442.

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(1) [1925] A. C. 112, 141.

In *In re Russian and English Bank* (1), on a petition by creditors with a disputed debt to wind up a Russian bank which had a branch in England and was dissolved by Russian law before the coming into force of the Companies Act, 1929, Bennett J. held that s. 338 of the Act did not alter the law as it was under the corresponding sections of the Companies Act, 1862, and the Companies (Consolidation) Act, 1908, and that the Court therefore had jurisdiction to wind up the company under that section.

The statement that the bank consisted at all material times of more than eight members must refer to the time of, or before, the dissolution. When there has been a dissolution, no time after it can be a material time for finding out how many members the company had, for after the dissolution it cannot have any members. The order made by Bennett J. in *In re Russian and English Bank* (1), which is the order sought on the present petition, was made under s. 338, sub-s. 1, para. (*d*), of the Companies Act, 1929. It is submitted that it is unnecessary to have recourse to sub-s. 2, under which the bank could be wound up because it has ceased to carry on business in this country. With regard to limitation, the law so far as the bank is concerned is that the statute does not begin to run until there has been a demand for payment.

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(1) [1932] 1 Ch. 663.

Fergus D. Morton K.C., *C. R. Havers*, and *M. Wolff* for certain shareholders at the beginning of the hearing, but not subsequently.

Oscar Kean for a supporting creditor.

W. P. Spens K.C., *Harold Murphy*, and *A. J. Halpern* for the bank and an opposing creditor. Neither in the case of the petitioner nor in the cases of the foreign gentlemen who support the petition is there an existing debt with regard to which the Court can make a winding-up order. The petitioner, a Russian subject by birth, was at all material times a Russian subject resident in Russia. The questions arise whether the debts due to him and to the supporters of the petition had not a local situation in Russia which could be affected by local legislation, and whether, on the evidence, the local legislation has not transformed the bank's liability into a liability to the Russian State Bank or the Russian Government. The evidence shows that the petitioner entered into all the liabilities either with or through the Archangel branch only, and the course of business between the parties was that goods were transmitted, on the petitioner's directions, to Archangel, where the branch made advances on the security of the documents and shipped the goods to London, and the proceeds of sale were credited to the Archangel branch, to which was remitted sufficient of the proceeds to discharge the debt. Under those circumstances, the course of business between the petitioner and the Archangel branch makes the debt due in 1918 and 1919 from the bank liable

(1) [1932] 1 Ch. 663.

to be affected, and in fact affected, by the Russian local legislation. The petitioner, therefore, has no debt of any sort or kind which English law will recognize as due to him, other than a debt from the Russian State Bank or Government. Before the Court can make an order it must have before it a petitioner with a good debt. No English creditor is asking for a winding-up. The circumstances under which the Court will usually wind up a foreign company are very different from those surrounding a company which has been nationalized by its own Government. In the present case the Russian Government has abolished the old debt and created a new one. That is clear from the very decrees on which a Russian creditor has to rely in order to present his petition. *New York Life Insurance Co.* v. *Public Trustee* (1), one of the insurance cases under the charging section of the Treaty of Peace with Germany, is an authority for the proposition that, in order to find the local situation of a debt, it is necessary to ascertain where it is recoverable. In *Rex* v. *Lovitt* (2), it was held that executors who had obtained ancillary probate in New Brunswick to the estate of a testator resident and domiciled in Nova Scotia and possessed at death of moneys deposited in the New Brunswick branch of the British Bank of North America, which had its head office in London, were liable to pay succession duty in New Brunswick. Lord Robson, delivering the judgment of the Privy Council, said (3): "The property consisted of simple contract debts, and as such could have no local situation other than the residence of the debtor where the assets to satisfy them would presumably be: per Lord Field in *Commissioner of Stamps* v. *Hope*" (4); see also *English, Scottish and Australian Bank, Ld.* v. *Inland Revenue Commissioners* (5), which was a case of a simple contract debt; *Ellis* v. *M'Henry* (6); and *Swiss Bank Corporation* v. *Boehmische Industrial Bank.* (7) The bank relies upon those cases as showing that the petitioner's debt was in 1917 and 1918 situate in Archangel and nowhere else, and that by reason of the local legislation, to which the Court in England will give effect, it is become a debt to the State Bank in Russia. The petitioner cannot claim as a former creditor of the bank; that is not all he is: he is a former creditor with regard to a debt which has been extinguished. It is submitted that that is true also of the supporting creditor whose debt is due from the Petrograd branch, and of another supporting creditor. Their debts have been transformed into state debts, and they cannot ask for a winding-up order. What the petitioner is really asking is that the Court, by means of its winding-up jurisdiction, should administer property in this country of the Russian Government. Rule 52 in Dicey's Conflict of Laws, 5th ed., p. 192, provides: "The Court has (subject to the Exceptions hereinafter mentioned) no jurisdiction to entertain an action or other proceeding against—(1.) any foreign sovereign; . . . ." and in the comment on the rule it is stated, at p. 195, that: "The immunity . . . . applies to the property of the sovereign, ..." Accordingly the Court, where it has notice that the property which it is asked to administer is that of a sovereign independent state, will refuse to exercise any jurisdiction in respect of that property: see *Aksionairnoye Obschestvo A. M. Luther* v. *James Sagor & Co.* (1), in which Scrutton L.J. said: "The principle of the immunity of foreign states from the jurisdiction of this country was stated by this Court in the *Parlement Belge* (2)"; see also *The Porto Alexandre.* (3) Under the winding-up jurisdiction the liquidator takes possession, and if the assets belong to a sovereign state that state must be a party to the proceedings. In the present case, the effect of a winding-up order would be to compel a sovereign state to come to the Court and claim its own property, which would be contrary to the authorities just cited. A somewhat similar point arose in *Perry* v. *Equitable Life Assurance Society of the United States of*

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(1) [1924] 2 Ch. 101.
(2) [1912] A. C. 212.
(3) Ibid. 212, 218.
(4) [1891] A. C. 476.
(5) [1932] A. C. 238.
(6) (1871) L. R. 6 C. P. 228.
(7) [1923] 1 K. B. 673.

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(1) [1921] 3 K. B. 532, 554.

(2) (1880) 5 P. D. 197, 217.

(3) [1920] P. 30.

America (1) with regard to a twenty year endowment life assurance policy which the plaintiff had taken out in Russia in 1903, and which was payable at the defendant company's office in St. Petersburg. In the action, the plaintiff, a British subject, sought to enforce the debt in this country, and it was held that the proper law of the policy was the law of Russia and that the plaintiff could not recover on the policy, as it was annulled by a Decree of Cancellation which, in November, 1919, had abolished life assurance in Russia: see also *In re Russian and English Bank* (2), in which it was admitted that the bank had ceased to exist.

If the Court holds that there is owing a debt on which the petition can be founded and that there is an entity which can be wound up, the ground on which the winding-up order is sought is purely a matter of fact. In truth and in fact, despite the terms of the Soviet decrees and the confiscation of shares, this branch continued to operate in some shape or form until the moment at which it passed into the Russian State Bank or into a Government department. The conclusion to be reached as to the basis on which it carried on business must depend upon the Court's view of the position of persons who happened to be in exclusive charge of a Russian bank after the decrees had been promulgated but before the Government had taken any step to enforce them against a particular branch.

It is submitted that the Court ought to hold that there is in England no petitioner to whom a proved debt is owing, and who is entitled to ask that the bank be wound up. There is no really just and equitable reason why this branch should be wound up. It is being carried on as far as may be in accordance with Soviet legislation in such a way that the Soviet Government may take steps, at any time it thinks fit, to bring it to an end.

Maurice Berkeley for a supporting creditor.

Stafford Crossman for the Attorney-General. In *Russian and English Bank* v. *Baring Brothers & Co.* (3) the Crown was the second defendant, and supported the first defendant's application to stay the proceedings. Eve J. held that the company had come to an end and was not in a position to maintain the action. The Crown was bound to accept the view that the company was dissolved. All that the Attorney-General could do in any later case was to comment on s. 338 of the Companies Act, 1929. That course he took in *In re Russian and English Bank* (1), in which he said: "With regard to s. 338, sub-s. 2, that sub-section, ... has a definite meaning. The word 'ceases' cannot refer to anything except the future, and sub-s. 2 only applies when dissolution is in futuro: that is to say, if a company has ceased to exist it cannot be wound up, but if in future it ceases to exist it can be wound up." Bennett J., in rejecting that view, said: "It had been decided before 1929 that an unregistered company might be wound up under the Act of 1862, the material section of which is replaced by s. 338, sub-s. 1 (*d*), of the Act of 1929, although the company had been dissolved before the Act came into operation. In other words, it had been decided on the language of the relevant section of the Act of 1862 that the words 'is dissolved' were equivalent to the words 'has been dissolved.' . . . . Mr. Gavin Simonds suggested, and I think rightly, that sub-s. 2 of s. 338 was added to the old law on the subject (which the section otherwise re-embodied) because of difficulties which had arisen in dealing in this country with corporations which owed their existence to the law of Russia, and if that be the reason, as I think it was, for the insertion of sub-s. 2, the Legislature did not, in my judgment, in 1929, intend to alter the law as it had existed under the Acts of 1862 and 1908." Bennett J. appears to have treated that case as if he was bound to find that the company had been dissolved in order that he might have jurisdiction to wind it up. In the present case the Attorney-General neither supports nor opposes the petition. There may be circumstances in which it is desirable, in the public interest, that the company should be wound up. It is not in evidence, but the Crown is in fact a creditor, and has for many years been receiving considerable payments on account of its debt. If a winding-up order is made, the question may arise whether those payments are valid. The order should, therefore, be made without prejudice to the Crown's claim to the bank's assets as bona vacantia.

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(1) (1929) 45 Times L. R. 468.

(2) [1932] 1 Ch. 663.

(3) [1932] 1 Ch. 435.

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(1) [1932] 1 Ch. 663, 666, 668, 669, 670.

D. B. Somervell K.C. in reply. Assuming that the Court is satisfied that the bank does not exist in Soviet law, the bank is wrongly before the Court. There can be no objection to those who contend that the bank does exist coming to the Court to make the contention, but if they fail to prove it none of their other arguments can be heard. If, therefore, the Court holds, after argument is closed, that the bank does not exist, the argument of counsel for the bank on the merits of the debt is not before the Court and the position is as it was in *In re Russian and English Bank.* (1) That decision seems to show that the Court has jurisdiction to make an order for the compulsory winding-up of a company which does not exist, even if there are grounds for thinking that the petitioner's debt may not be substantiated. It is submitted that the local situation of the debt is not Russia but Great Britain. The actual sterling credit to the petitioner appears in the books of the Archangel branch. What happens is that the sterling is paid into the London branch and the proceeds of the sale of the goods go into the Archangel branch's credit at the London branch, part of it being turned into roubles by the London branch. The place at which the debts are payable and the natural place at which to sue for them is not Archangel, because nobody wants sterling there. Sterling in Archangel is a mere commodity. The credit was a sterling credit in England and in the ordinary course would have been paid to the petitioner. The contract with the bank in Archangel was that any sterling resulting from the proceeds of sale of the petitioner's goods not required to pay off his indebtedness should be paid to him in London. It is a point of very great substance whether the Court ought to draw the inference from what happened that the sterling credit should be payable in London. Sterling in London

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(1) [1932] 1 Ch. 663.

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was the sterling to which the petitioner was entitled. If the debt was locally situate in Russia, the bank must establish that it was destroyed or annulled by the Soviet decrees, which it has failed to do. The annulment consequent upon the dissolution of a company is not an annulment which can be used for the purpose of bringing the company within s. 338 of the Companies Act, 1929. It is necessary to show in the decrees something other than the dissolution, something which would not affect an English debt or creditor but would affect a Russian debt or creditor. A transfer of assets and liabilities to the State Bank does not under English law abolish the debt. It must be shown that something happened to destroy the debt to the dissolved company.

[*W. P. Spens K.C. In re Wells* (*Sir Thomas Spencer*) (1) is a recent decision that s. 296 of the Companies Act, 1929, whereunder property and rights vested in a company on its dissolution belong to the Crown as bona vacantia, does not apply to any company dissolved before that Act came into force.]

The opening words of the section, " Where a company is dissolved . . . .," are in the present tense. In certain contexts that tense can apply only to events which happened after the Act came into force. It may, however, apply to events which happened before the Act came into force, and it is permissible to look at each particular context in which the tense is used to discover to which events it does apply.

Cur. adv. vult.

Feb. 22. MAUGHAM J. [after stating the facts substantially as set out above :] The debt of the petitioning creditor is disputed, and apart from that the case is one in which considerable difficulty arises by reason of the Russian revolutionary legislation which has been so often before English courts during the last few years.

The most convenient course will be for me to state my view with regard to the Russian legislation and the position in law of the bank before dealing with the question whether there is a proper petitioner. The expert witnesses on Soviet law were on the one side Mr. Serge Konkevitch and on the other Mr. Samuel Dobrin. They have both had large experience in the practice of Russian law both before and since the revolution of October, 1917, and they are eminently qualified to assist in the elucidation of the relevant decrees. Each of them has made affidavits, and each of them has been cross-examined at considerable length before me. Various courts in this country have had to consider the true effect of the same Russian decrees in the light of the expert evidence given in particular cases; and I have even had the advantage of three decisions of the House of Lords dealing with the statutes in question from different points of view. The last of these cases was that of *Lazard Brothers & Co.* v. *Midland Bank, Ld.* (not yet reported), in which the House of Lords dismissed an appeal from the Court of Appeal. (1) In the speech of Lord Wright, in which the other learned Lords concurred, it is pointed out that the question of the effect of the foreign law must depend upon the evidence given with regard to that law, and that no earlier decision of the Court can relieve the judge of the duty of deciding the question on the actual evidence given in the particular case. The decrees in question begin with a decree on the nationalization of banks passed on December 14, 1917, and followed within a few weeks by a decree of the People's Commissaries signed by Lenin on January 26, 1918. These decrees are so close together in date that I think they may properly be considered together. The first starts with a preamble referring to the desirability of "a resolute eradication of banking speculation and a complete liberation of the workers, peasants, and the whole labouring population from exploitation by banking capital," and of establishing a single People's Bank of the Russian Republic—namely, one "genuinely serving the interests of the people and the poorest classes," and it is thereby decreed: "1. Banking is declared a State monopoly. 2. All existing joint-stock banks and banking houses are amalgamated with the State Bank.

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(1) Ante, p. 29.

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(1) [1932] 1 K. B. 617.

3. The assets and liabilities of the liquidated banks are taken over by the State Bank. 4. The method of amalgamation of joint-stock banks with the State Bank shall be determined by a special decree. 5. The management of the business of joint-stock banks is temporarily placed in the charge of the Council of the State Bank. 6. The interests of small investors shall be fully safeguarded." By the decree passed a few weeks later it was declared as follows: "1. The share capital (stock, reserve and special) of former joint-stock banks are (*sic*) transferred to the State Bank of the Russian Republic on the basis of complete confiscation. 2. All bank shares are declared null and void, and payment of dividends of any kind whatsoever is unconditionally stopped. 3. All bank shares must forthwith be surrendered by the present holders to the local branches of the State Bank. 4. The holders of bank shares which they cannot produce must submit to the branches of the State Bank register records of the shares in their holding, indicating their exact whereabouts. . . . . 6. All transactions and deeds of transfer referring to bank shares are unconditionally prohibited. Persons taking part in such prohibited transactions and deeds are punished with imprisonment up to three years."

By a decree of April 18, 1918, further prohibitions were enacted in reference to the alienation of shares and securities. On September 20, 1918, a resolution of the Council of the People's Commissaries was passed which I understand has the effect of a statute. It was in the following terms: "(1.) To recognize that by the decree of December 14, 1917, there is established the principle of monopolization of banking in Russia by means of nationalization (or liquidation) of all the then existing private and public credit institutions. (2.) To instruct the People's Commissary of Finance to carry out urgently by administrative procedure the nationalization (or liquidation) of all still existing credit institutions. (3.) To direct the People's Commissary of Finance to submit to the Council of People's Commissaries periodical reports as to the course of nationalization of banks and as to the position of banking."

On December 10, 1918, certain instructions were approved by the People's Commissary of Finance on the method of nationalization of private banks. These are lengthy and I do not think it is necessary for me to refer to them in detail, since in the view I take of the matter they only remotely affect any question which I have to decide.

One of the matters in dispute upon these decrees and resolutions between Mr. Konkevitch and Mr. Dobrin is whether in the result a banking company such as the bank in the present case has ceased to exist by Soviet law for any purpose, or whether, as Mr. Dobrin contends, the bank would continue to exist as a legal entity so long as it had any continuing branch not taken over by the Soviet Government. The bank became from his point of view a shrinking entity which had had carved out of it the main body of its establishments whilst the remaining establishments would become a Soviet state agency as soon as the Soviet Government chose to call upon the persons responsible for those branches to hand them over to its representatives. Mr. Dobrin asserts that, according to Soviet law, the Soviet Government may order the persons responsible for the London branch to hand over that establishment (which must mean its assets) to a Soviet commissar whenever it is pleased so to order. I do not think this is the view of Mr. Konkevitch, and I think it is not a well founded view, for, as will be seen later, the Soviet Government does not itself assert that the nationalization decrees have an extra-territorial effect. But the question is mainly one of English law, and I shall endeavour to show that English views of private international law in no way justify the contention of Mr. Dobrin. Nor can I accept as correct his opinion that shares in banking companies could continue to exist after January 26, 1918, according to Soviet law. The language of that decree coupled with that of the previous decree seems to me clearly to negative such a contention. How can a share, which is only a name for a bundle of rights, continue to exist when every right which it originally conferred has been destroyed and when the share certificate (according to Mr. Dobrin) is itself null and void ?

I find myself unable to grapple with this conception, except perhaps from a metaphysical standpoint, and again I must prefer the view of Mr. Konkevitch.

It may readily be admitted that legislation of the character in question leads to difficulties of interpretation, since the main object at that date was confiscation, and the language used is not that of lawyers. But the subsequent legislation is expressed in language which it is not difficult even for an English lawyer to understand.

On January 19, 1920, the People's (State) Bank of the Soviet Republic was abolished by a decree which began by reciting that there was no longer any need to use that bank as an institution of state credit and that there was no necessity for the existence of separate banking institutions. By the decree all the assets and liabilities of the late People's Bank were transferred to the Central Budget and Accounts administration. In passing I note that the decree assumes that all the assets and liabilities of the former joint-stock banks capable of being vested had already been vested in the People's Bank.

The Civil Code of the Russian Socialist Federal Soviet Republic came into force in October, 1923. It may be observed that by para. 3 interpretation of provisions of the Code on the basis of laws of overthrown governments and of practice of pre-revolutionary courts was forbidden. Articles 13 and 14 as translated were as follows : " Article 13. As juristic persons are recognized associations of persons, institutions or organizations which can, as such, acquire rights of property, enter into obligations, sue and be sued in courts. Article 14. Juristic persons must have statutes or regulations confirmed and in proper cases registered by the governmental body empowered to do so. Partnerships of a kind determined in law which pursue economic purposes, instead of statutes, may have partnership agreements registered in an established manner. Legal capacity of a juristic person arises from the moment of the confirmation of the statutes (regulations), and in the cases where the registration of a juristic person is required by law, from the moment of such registration."

It is admitted that there was no registration of the bank under this code, and it seems to me that, since Tsarist regulations would not be recognized in the Soviet Republic, it must follow that the bank cannot any longer be considered as possessing a juristic personality according to Russian law. In coming to this conclusion I again follow the opinion expressed by Mr. Konkevitch, and I am not able to understand the grounds on which Mr. Dobrin suggests that the extremely peculiar position of the bank puts the bank outside the provisions of s. 14 of the Civil Code.

If, then, it is material to determine whether the bank at the date of the petition to wind up was a juristic person in any intelligible sense, I must express an opinion in the negative.

It is desirable to add that the position of the bank after the passing of the decrees in question, apart from the question whether it was dissolved as a corporation, was quite anomalous. According to the statutes under which it was incorporated in the month of June, 1871, the bank had a capital divided into shares of 250 roubles each with provisions for an increase in the future with the confirmation of the Minister of Finance. The shares, according to the desire of the shareholders, might be made out in their name or to bearer. In chapter 2 of the statutes a number of limitations are placed upon the powers of the bank; and it may be mentioned that the total of the amounts accepted by the bank, including its branches, as deposits and its other liabilities, was not under any circumstances to exceed the bank's reserve and stock capital more than ten times. The management of the affairs of the bank was entrusted to the council and the board. The council was to consist of fifteen members elected at the general meeting from amongst the shareholders holding not less than seventy-five shares. Out of the total number of fifteen members of the council at least ten had to be permanent residents of St. Petersburg. The members of the council elected at the first general meeting would remain in that capacity for two years and thereafter five members of the council would have to resign annually on the expiration of three years' service. For the validity of the decision of the council not less than six members had to participate and in the decision of some questions not less than ten. The powers and responsibilities of the council were carefully laid down in the statutes. The board was to consist of four members elected by the general meeting of shareholders from persons presented by the council, and the qualification was the holding of not less than 100 shares. The board was to meet not less than once a week, and there were careful provisions as to its duties. In chapter 4 there were a number of articles providing for general meetings of shareholders, and it should be noted that the calling together of a general meeting was to be effected by the board through an advertisement in the Pravitelstvenny Vestniek (Government News) and in one more St. Petersburg and one Moscow paper, at least six weeks before the date fixed for the meeting, stating the questions which it was proposed to have discussed by the shareholders. There were provisions for a quorum. No matters could be brought before the general meeting otherwise than through the board after a preliminary examination by the council.

It is clear that after January, 1918 (if not before), none of these provisions could be complied with, and if the corporation continued to exist as a legal entity there was no possibility of carrying on its affairs according to the statutes under which it was formed. How a branch of the bank in England could continue to function in these circumstances it is difficult to understand. The suggestion that the managers of a branch were bound, according to the view of the Soviet Government, to act as their agents and were treated as guilty of " sabotage " if they left their posts, is one which I think I can appreciate so far as regards any branch under the jurisdiction of that Government, but that is a question of municipal law and policy, with which I am not concerned, in relation to the persons in control of the branch of the bank in London. In the absence of any decree even purporting to impose an obligation or a responsibility on managers and employees in London, and without, I may add, any provision for remunerating them, and irrespective of their domicil or nationality, I cannot think there is any ground for the contention that such managers and employees ought to be regarded as agents of the Soviet Government. It may be pointed out that fifteen years have elapsed since the nationalization decrees above referred to, and so far as I know the Soviet Government has had no communication whatever with the persons in de facto control of the assets of the bank in London. It has not sought to intervene in the affairs of this branch or of any other branch in this country of a Russian bank or a Russian insurance company. It seems from the evidence that the London branch is in fact controlled by persons residing in France, some or all of whom have escaped from Russia. I understand that the French courts take a very different view of the questions of private international law which arise from the views taken in this country, and that the bank is treated in France as an existing entity capable of carrying on business and of suing and being sued in the French courts. This serves to explain the de facto position, but I conceive that I am not justified in placing reliance on these facts in dealing with the problems that arise here.

In view of the substance of the nationalization decrees and of the Russian Code, I doubt very much whether anything turns upon the theoretical correctness of my conclusion that the bank has ceased to be a juristic entity. The Soviet decrees, so far as their jurisdiction extends, have taken away all the assets of the bank and, as pointed out above, all the shares in the bank have been annulled or destroyed. The framers of the decrees of 1917 and 1918 were plainly not concerned with the continuance of the juristic existence of such an institution. They were not troubled with juristic theories: the decrees, as is admitted by both experts, were of a confiscatory character. Bearing in mind that only a part of the present territory of the Soviet Republic was in the hands of the then revolutionary body, it seems to me idle to suppose that the Central Executive Committee of the All Russian Congress of Soviets could have intended that branches of banks, whose head offices in Petrograd or Moscow had been taken over by state commissars, were to be entitled to continue to function in the provinces or abroad until there had been a complete taking over by the state of all such branches. This, as Mr. Konkevitch points out, would have entailed as regards those branches the withdrawal of money by depositors, the disappearance of valuables and the transfer of money and of the bearer shares abroad. But I place little weight on this consideration. The decrees, as regards banks whose seats and principal offices were taken over by the state, must be regarded as so crippling the powers of the companies that, if not extinct, they could no longer exhibit any of the signs of life. At the best, and assuming that Mr. Dobrin is right in his view, the bank, as a legal corporation, deprived as it was of its assets and its corporators, became no more than a legal conception. Its branch in England, if an old metaphor may be employed, is now a submerged wreck floating on the ocean of commerce. It has had for the past fifteen years neither compass nor officers nor crew; no one who could direct its movements. As a branch of the original bank it appears, however, to have or to have had creditors in this country, and if the petition before me is properly presented I am of opinion both that the bank has ceased legally to carry on business, and that it is just and equitable that it should be wound up. The essential features of the case are, indeed, of a simple character. A corporation created and established under a foreign legal system has been allowed by our laws to carry on business and to incur debts in this country. Its corporate powers, if not its corporate existence, have been destroyed in its country of origin; many years have elapsed, and no attempt has been made to pay the creditors in this country. It cannot be doubted that in such circumstances the Court, if it has jurisdiction, ought to make an order which will secure as far as possible the payment of all just claims against the corporation.

The petition is presented under s. 338 of the Companies Act, 1929, and it is not in dispute that the bank is an unregistered company within the meaning of that section: see s. 337. The circumstances in which an unregistered company may be wound up are stated as follows: "(i) If the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding up its affairs; (ii) If the company is unable to pay its debts; (iii) If the court is of opinion that it is just and equitable that the company should be wound up": s. 338, sub-s. 1 (*d*). It is plain that any one of these three circumstances is sufficient to justify the order. The question whether the words, "if the company is dissolved," are equivalent to "has been dissolved," was decided in the affirmative in the recent case of *In re Russian and English Bank* (1) by Bennett J., and accordingly his Lordship saw no reason for placing special reliance in that case on the provisions of s. 338, sub-s. 2. Following the decision in question, I hold that there is jurisdiction to wind up the company under the provisions of the section, whether or not the company has been dissolved or has completely ceased to exist as a company under or by virtue of the laws of the Soviet Government. It does not seem to me to be necessary to consider on the present occasion the difficulties that plainly arise in relation to the winding-up of a corporation which has already ceased to exist, and any order that may be made must be made without prejudice to a possible claim by the Crown on the basis of the property in this country being bona vacantia: see *In re Higginson & Dean* (2), and also s. 296 of the Companies Act, 1929, if applicable.

The position of the petitioner must now be considered. He claims to be a creditor for 23,000*l.* and upwards, representing proceeds of sale of flax and hemp sold by the London branch of the bank on his behalf from time to time and not yet paid or accounted for. He has made certain affidavits and was cross-examined on the hearing of the petition. On the other hand, Mr. Richard Arthur Merz, who claims to have been in the employ of the bank since the year 1900, has given evidence disputing that any sum is due to the petitioner on the ground,

(1) [1932] 1 Ch. 663. (2) [1899] 1 Q. B. 325.

as I understand it, that the debt due to him was credited to him in the books of the Archangel branch of the bank, that this sum was taken over by the State Bank of the Northern Province in September, 1919, and that the amount of sterling due to the petitioner was paid to Messrs. N. M. Rothschild & Sons on October 3, 1918, for the account of the Archangel State Bank. I confess I have been unable to follow precisely what was done by the petitioner and the London branch of the bank, nor can I understand how the petitioner is affected by a payment to Messrs. Rothschild made apparently without any direction or authority from the petitioner. There is, however, a real question in dispute, and that is whether the debt to the petitioner was or was not locally situate in Russia at the date of the decrees of 1917 and 1918 above referred to. If it was locally situate in Russia, it seems to me that as the effect of the legislation the debt is no longer due by the bank as a corporation, and that the only claim of the petitioner is against the Soviet State. By the decree of December, 1917, the assets and liabilities of the bank within Soviet territory were taken over by the People's Bank, and this in my opinion involves the destruction of the original debt and a kind of statutory novation (in some sense, perhaps, only a theoretical one) whereby the State Bank became liable to discharge it. This legislation must be taken to be effective as regards property situate in the territory of the Soviet Republic (see *Princess Paley Olga* v. *Weisz* (1)), in which it was held that the English Courts will not inquire into the legality of acts done by a recognized foreign Government against or in relation to its own subjects in respect of property situate in its own territory. It seems to me to be clear that the same principle must apply, whether the property consists of chattels or of a debt regarded in this country as having a local situation. If, then, it were to be established that the debt of the petitioner was represented by a credit to him in the Archangel branch of the bank, I should be of opinion that that debt had ceased to exist. The petitioner, however, has sworn that if the Archangel branch was credited with the proceeds of the goods sold by the London branch on his instructions it was done without his authority. The effect of the correspondence in relation to the matter is not conclusive, and the evidence does not enable me to express a final opinion on the claim of the petitioner to be a creditor for a debt recoverable in London. If the debt was primarily recoverable in London, I am of opinion that it was not affected by the Soviet legislation, even though it was due to a person who was a Russian subject at the date of the nationalization decrees. Its locality must be taken to be the place where the debt was in the ordinary course recoverable: see *Rex* v. *Lovitt* (1), *New York Life Insurance Co.* v. *Public Trustee* (2), and *English Scottish and Australian Bank, Ld.* v. *Inland Revenue Commissioners.* (3) The decrees in question could not according to our laws have the effect of extinguishing the debt, if locally situate here, or of transferring it to the Soviet Republic. This follows, I think, from the decisions of Hill J. and the Court of Appeal in *The Jupiter* (*No.* 3). (4) It is interesting to note that the same view is taken by the R. S. F. S. R. itself in a circular dated April 12, 1922, and in a circular issued by the People's Commissariat of Justice to all Districts Courts dated September 26, 1923, which are set out in the elaborate judgment of Hill J. above referred to. These circulars show that the Soviet Government does not regard the nationalizing decrees as having any extra-territorial effect even as against Russian citizens. Moreover, it is evident that our Courts have never entertained the view that a debt incurred here by a foreign corporation permitted to carry on business here under English law can be discharged by a foreign statute. An example is to be found in the case of *Employers' Liability Assurance Corporation* v. *Sedgwick, Collins & Co.*, the report of which in the Court of Appeal is entitled *Sedgwick, Collins & Co.* v. *Rossia Insurance Co. of Petrograd.* (5) It may be observed that the decrees of the Russian Legislature in relation

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(1) [1929] 1 K. B. 718.

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(1) [1912] A. C. 212.
(2) [1924] 2 Ch. 101.
(3) [1932] A. C. 238.
(4) [1927] P. 122, 144, 145; 250.
(5) [1926] 1 K. B. 1; [1927] A. C. 95.

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to insurance companies were on the same lines as those in relation to private banking companies at any rate to this extent, that the insurance businesses in Russia were nationalized so that the assets of such companies, so far as Russian statutes could effect such a result, were transferred to the Russian State. In the Court of Appeal Sargant L.J. in his judgment observed as follows (1): "Nor do I think that the position of creditors here as against property of the Rossia Insurance Company here, such as debts owing to them from debtors in this country, is altered by legislation or decrees of the Russian sovereign power which 'nationalized' the undertaking and assets of the Rossia Insurance Company, that is, as I understand it, purported to transfer these assets from their private proprietors to the Russian nation as a whole. Effective as such legislation may be within the limits of Russian territory, it cannot determine the ownership of property locally situate in this country, such as debts owing from debtors here: see Dicey, Conflict of Laws, 2nd ed., p. 310, and *Lecouturier* v. *Rey* (2), an analogous case with reference to the goodwill of a trade mark or trade name in England." This view was plainly concurred in by Bankes L.J. in the same case, and it must also have been accepted as correct in the House of Lords.

If a winding-up order is made it is possible that the Russian Government may think fit, subject perhaps to the discharge of such liabilities as may be established, to make a claim to the residue, if any, of the assets, though this will involve a complete reversal of the view expressed in the circulars of 1922 and 1923 above referred to. On the other hand the Crown may have a claim to the whole of the assets as bona vacantia. These circumstances do not afford in my opinion a ground for declining to make an order. Counsel for the bank placed considerable reliance on a dictum of Scrutton L.J. in the case of *Aksionairnoye Obschestvo A. M. Luther* v. *James Sagor & Co.* (3), and counsel for the bank suggested that the Court has no jurisdiction to make a winding-up order, inasmuch as the Soviet Government is entitled, according to Mr. Dobrin, to take over the assets of the London branch, so that the case would come within the general rule that the Court has no jurisdiction to entertain a proceeding against a foreign Sovereign nor one in which the property of a foreign Sovereign is involved. I should observe, however, that the Lord Justice was dealing with a case in which the Russian Government had passed a decree the effect of which was to forfeit the property belonging to the plaintiffs locally situate in Russia. He expressed the opinion that if Mr. Krassin, the representative of the Russian Commercial Delegation in London, had brought the goods in question with him into England and had declared on behalf of his Government that they were the property of the Russian Government, no English court could investigate the truth of that statement. To do so, he said, would not be consistent with the comity of nations as between independent sovereign States. He then added this: "In *Morgan* v. *Larivière* (1) the opinions as to the power of the Court to deal with a trust fund in which a foreign Government was interested were obiter dicta—as the Court held there was in fact no trust fund." I would observe with respect that when *Larivière* v. *Morgan* (2) was before the Court of Appeal, Lord Hatherley, then Lord Chancellor, considered with some elaboration the question whether the Court could administer what was believed to be a trust fund notwithstanding the circumstance that the French Government was largely interested in it and was not before the Court; and he decided, for reasons which, if I may say so, seem to me to have great weight, that there was no objection on that ground to an administration by the Court. This in the Court of Appeal was a matter not of dictum but of decision, and, supported as it is by a very clear statement of Lord Cairns in the House of Lords to the same effect, I am bound to hold that the circumstance that a foreign Government is or may be interested in a trust or other like fund is no reason why the Court should decline jurisdiction. The proposition in the

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(1) [1926] 1 K. B. 1, 15.
(2) [1910] A. C. 262.
(3) [1921] 3 K. B. 532, 555.

(1) L. R. 7 H. L. 423, 430. (2) L. R. 7 Ch. 550; L. R. 7 H. L. 423, 430.

present case must go as far as this, that if a foreign Government may possibly make a claim to some interest in the assets which would reach the hands of a liquidator the Court must decline to make a winding-up order. For the reasons given I am unable to accede to this view. Of course, if I am right in thinking that the nationalization decrees have no extra-territorial operation the R. S. F. S. R. have no claim to any of the property which is involved, and as I have pointed out, this seems to be their own view.

As stated above, I am not satisfied that the petitioner is in the peculiar circumstances a creditor. A similar difficulty existed in the case already cited of *In re Russian and English Bank.* (1) Bennett J. held that, notwithstanding the general rule that a disputed debt may not form the basis of a creditor's petition for the winding-up of a company, the petitioners would in the circumstances be otherwise without a remedy and were entitled to proceed by a winding-up petition, and he accordingly made a compulsory order. Substantially the same circumstances exist here, and moreover in the present case there are two other creditors supporting the petitioner, one of whom seems to have a debt locally situate in this country. The Attorney-General, it should be mentioned, has taken up an attitude of neutrality. He neither supports nor opposes the petition. So far as I can see, no harm can be done to any one by the making of a winding-up order. On the whole, therefore, I think I am justified on this point also in following the decision last mentioned, and in making the usual order for the compulsory winding-up of the company.

Solicitors: *Herbert Oppenheimer, Nathan & Vandyk; Frank Titmuss & Co.; Pittman & Davison; Stephenson, Harwood & Tatham; Samuel Sebba; Treasury Solicitor.*

(1) [1932] 1 Ch. 663.

K. R. A. H.

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[1933. W. 700.]

Administration—Order of Application of Assets—Solvent Estate of deceased Testatrix—Legacies—Debts, Funeral and Testamentary Expenses—Lapsed Share of Residue—Administration of Estates Act, 1925 (15 *Geo.* 5, *c.* 23), *s.* 33, *sub-ss.* 2, 7 ; *s.* 34, *sub-s.* 3 ; *Sch. I., Part II.*

Testatrix by her will after appointing a sole executor thereof and bequeathing a number of pecuniary legacies gave devised and bequeathed all the residue of her estate both real and personal to E. S. and L. M. H. in equal shares absolutely. E. S. died in the lifetime of the testatrix, and her moiety lapsed and passed as on an intestacy :—

Held, that the order of the application prescribed by the Administration of Estates Act, 1925, s. 33, sub-s. 2, and Sch. I., Part II., being under s. 33, sub-s. 7, s. 34, sub-s. 3, and Sch. I., Part II., expressly subject to variation by the provisions of the will, and there being in this case no such provisions, the statutory order must be followed, and that both the debts, funeral and testamentary expenses and the legacies were payable primarily out of the lapsed share of the residue.

In re Tong [1931] 1 Ch. 202 applied.

Appeal from a decision of Bennett J.

Mary Russell Worthington by her will dated January 6, 1930, after appointing the plaintiff Ernest Barnard Nichols sole executor thereof, and bequeathing a number of pecuniary legacies, all free of legacy duty, amounting to 2750*l.*, gave devised and bequeathed all the residue of her estate both real and personal to Elizabeth Singer and the defendant Louisa Miriam Hart in equal shares absolutely.

The testatrix died on June 30, 1932, and her will was duly proved on August 22, 1932.

Elizabeth Singer named in the will died on March 22, 1932, in the lifetime of the testatrix.

The estate of the testatrix was sworn for probate at 5967*l.* 11*s.* gross and 5924*l.* 15*s.* net.

The present originating summons was taken out by the plaintiff against the defendant Louisa Miriam Hart and Francis Charles Kelly, one of the next of kin, for the determination (inter alia) of the question whether in the events

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which had happened (*a*) the testatrix's debts, funeral, testamentary and administration expenses, and (*b*) the pecuniary legacies given by the will and the duties payable thereon were payable primarily out of the moiety of the testatrix's residuary estate bequeathed to Elizabeth Singer, who predeceased her in exoneration of the moiety thereof bequeathed to the defendant Louisa Miriam Hart.

Bennett J. held that the debts, funeral and testamentary expenses were primarily payable out of the lapsed share in exoneration of Louisa Miriam Hart's share, but that the legacies and duties thereon were payable out of the general estate before shares of the residue were ascertained.

The defendant Louisa Miriam Hart appealed. The appeal was heard on May 5 and 8, 1933.

Harold Christie for the appellant. Prima facie the legacies are thrown upon the undisposed of property by s. 33, sub-s. 2, of the Administration of Estates Act, 1925, but by sub-s. 7 this section has effect subject to the provisions contained in the will of the deceased.

There is no question as to the debts, funeral and testamentary expenses being primarily payable out of the lapsed share; the only question is whether the legacies follow the same rule. The first case in which the matter was dealt with is *In re Lamb*. (1) In that case it was held by Eve J. that there being no direction to the contrary in the will the lapsed share was under s. 34, sub-s. 3, and Part II. of Sch. I. of the Administration of Estates Act, 1925, primarily applicable to the discharge thereout of the funeral and testamentary expenses and legacies. That case is, it is submitted, good law. In *In re Petty* (2) Astbury J. came to a different conclusion on the facts. Both those cases were considered in *In re Kempthorne* (3) and *In re Tong*. (4)

In *In re Kempthorne* (3) Maugham J. held that the debts, etc., but not the legacies, had to be paid out of lapsed shares of residue, but the Court of Appeal held that there was a sufficient direction in the will to exclude the operation of

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(1) [1929] 1 Ch. 722.

(2) Ibid. 726.

(3) [1930] 1 Ch. 268.

(4) [1930] 2 Ch. 400; [1931] 1 Ch. 202.

Part II. of the First Schedule to the Act, and that debts, etc., as well as legacies must be paid before the residue was ascertained.

Here the appellant is simply asking the Court to bring legacies into a line with debts, etc. There was here simply a gift of legacies and no direction in the will as to their order of payment.

[LAWRENCE L.J. The difficulty I feel is in giving a different meaning to residue in the case of legacies to what it has in the case of debts.]

The present case is really covered by the decision of the Court of Appeal in *In re Tong.* (1)

D. S. Chetwood for Francis Charles Kelly, representing the next of kin. It is submitted that the gift in the will of " all the residue " of the real and personal estate operated as a direction that the legacies should be paid before the residue was ascertained: see s. 34, sub-s. 3, and s. 33, sub-s. 7. What is given to the residuary legatees is what remains after the legacies have been paid and the residue thus ascertained. The word " residue " is otherwise meaningless. The legacies are therefore payable out of the general estate before the residue is ascertained, and not primarily out of the lapsed share.

LORD HANWORTH M.R. This appeal must be allowed. The will, made on January 6, 1930, is that of Mary Russell Worthington, who died on June 30, 1932, and probate of which was granted on August 22, 1932. The value of the estate was sworn at 5967*l.* 11*s.*, and was sufficient to cover both the debts, funeral and testamentary expenses, and the legacies. By her will the testatrix, after appointing the plaintiff Ernest Barnard Nichols sole executor and bequeathing certain pecuniary legacies amounting to 2750*l.*, gave devised and bequeathed all the residue of her estate both real and personal to Elizabeth Singer and the defendant Louisa Miriam Hart (in the will called Loulou Miriam Hart) in equal shares absolutely. Elizabeth Singer

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died on March 22, 1932, about three months before the death of the testatrix, with the result that her share of the residue lapsed.

The question is whether the legacies and the debts, funeral and testamentary expenses are payable primarily out of the lapsed share or whether the debts, etc., only are so payable. Bennett J. held that in the circumstances the debts, etc., were payable primarily out of the lapsed share, but that the pecuniary legacies were payable out of the general estate before the residue was ascertained.

The Administration of Estates Act, 1925, provides for the order of administration of solvent estates. In s. 33, sub-s. 2, there is the direction that: "Out of the net money to arise from the sale and conversion of such real and personal estate (after payment of costs), and out of the ready money of the deceased (so far as not disposed of by his will, if any), the personal representative shall pay all such funeral, testamentary and administration expenses, debts and other liabilities as are properly payable thereout having regard to the rules of administration contained in this Part of this Act, and out of the residue of the said money the personal representative shall set aside a fund sufficient to provide for any pecuniary legacies bequeathed by the will (if any) of the deceased." Sub-s. 7 reads: "Where the deceased leaves a will, this section has effect subject to the provisions contained in the will." Then in s. 34, sub-s. 3, it is provided that "Where the estate of a deceased person is solvent his real and personal estate shall, subject to rules of Court and the provisions hereinafter contained as to charges on property of the deceased, and to the provisions, if any, contained in his will, be applicable towards the discharge of the funeral, testamentary and administration expenses, debts and liabilities payable thereout in the order mentioned in Part II. of the First Schedule to this Act." Part II. of the First Schedule is headed "Order of Application of Assets where the Estate is Solvent" and by para. 1 the first in order is: "Property of the deceased undisposed of by will, subject to the retention thereout of a fund sufficient to

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meet any pecuniary legacies." Having regard to those sections and the paragraph of Part II. of the First Schedule which I have read, is there any reason for the distinction made by Bennett J. between debts and funeral expenses on the one hand and pecuniary legacies on the other? The learned judge seems to have read the will as providing for the payment of the legacies first and to have thought that the residue was not to be ascertained until after they had been paid. But the provisions of the statute indicate that unless there is some provision in the will which negatives the prescribed order of administration, that order of administration must apply both to legacies and to debts. The learned judge seems to have thought that because of the specific reference to legacies in the will there was an indication of an intention that the statutory order of administration should not apply to them. But, after all, if legacies are given by a will, there must be a specific reference to them, and I do not see how that can be sufficient to alter the statutory order of administration.

When I look at the decision of the Court of Appeal in *In re Tong* (1), it seems really to cover the decision in this case. In that case I see that I said (2): "There are express directions (in the will) as to some matters. Is it not the fair inference that he (the testator) intended the statutory table to be followed in regard to the payment of other expenses, debts or liabilities? I cannot accept the view that there is any indication in the words used in the will that the statutory order of application of assets was not to apply in regard to these other matters." Romer L.J. there said (3): "I fail to find anything in the will amounting to an indication of the testator's intention that the funeral and testamentary expenses and debts generally should be paid in any other mode than that specified in Part II. of the First Schedule. Even if the testator had directed his executors to pay all his funeral and testamentary expenses and debts and then given the remainder of his estate on certain trusts, I should still have hesitated to say that this amounted to an indication that the expenses and debts were to be paid in any other order out of the assets than that provided for in the First Schedule. The truth of the matter is that there is nothing in this Act which prevents or is intended to prevent executors from paying expenses, debts and liabilities out of the first assets coming to their hands available for the purpose; and Part II. of the First Schedule really only deals with the ultimate adjustment of the burden as between the parties becoming entitled to the testator's estate. Therefore the use of such a word as 'remainder' does not seem to me to make any difference. Such words throw no light on how as between the persons having beneficial interests in remainder the liability for expenses and debts is to be apportioned." I also find a difficulty in holding that there should be any change made in the statutory order of payment because the testator may have used such a word as "remainder."

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(1) [1931] 1 Ch. 202.
(2) Ibid. 211.
(3) Ibid. 212.

For the reasons that I gave in that case, and have given in this case, I agree entirely with what was said by Romer L.J. in *In re Tong.* (1) There is here nothing in the will which amounts to a direction that there should be any differentiation between the legacies on the one hand and the debts, etc., on the other hand, or that the legacies ought to be paid otherwise than as directed by the Act.

There will, therefore, be a declaration that the debts and legacies are payable primarily out of the lapsed share of the residue bequeathed to Elizabeth Singer.

LAWRENCE L.J. I agree. The question is whether the will contains any provision which operates to vary the order of administration prescribed by the Act. It was contended for the respondent that the gift of "the residue of my estate" operated as showing an intention to effect such a variation. In my opinion that contention is not well founded. The will contains no direction as to how the executor is to administer

(1) [1931] 1 Ch. 212.

the estate and no direction indicating an intention that the legacies should be paid otherwise than in the statutory order of administration. In *In re Kempthorne* (1) the Court of Appeal, varying the order of the Court below, brought debts into line with legacies. That was the converse case to the present. Here I can see no real difference between debts and legacies, and I think that legacies ought to be brought into line with debts.

I agree with what Romer L.J. said in *In re Tong* (2)—namely: "Part II. of the First Schedule really only deals with the ultimate adjustment of the burden as between the parties becoming entitled to the testator's estate. Therefore the use of such a word as 'remainder' does not seem to me to make any difference. Such words throw no light on how as between the persons having beneficial interests in the remainder the liability for expenses and debts is to be apportioned."

In my opinion the appeal should be allowed.

ROMER L.J. I agree. Sects. 33 and 34 of the Administration of Estates Act, 1925, provide that real and personal estate of a deceased person shall for the future be administered in a way materially different from what was the case before the Act, and they provide for the payment of debts, funeral and testamentary expenses and legacies in a way very different from that in use before the Act was passed. It is recognized in both sections that a testator may provide for a different order of administration, that is, he may provide for payment of debts, expenses and legacies in a manner different from that specified in the Act. In the present case, however, I can find nothing in the will as to the order of priority in which the assets are to be administered. All I find is a gift of legacies and a gift of residue, and there is no direction given to the executor as to how, as between the persons ultimately found to be interested in the estate, the debts, expenses and legacies

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(1) [1930] 1 Ch. 268.

(2) [1931] 1 Ch. 202, 212.

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are to be paid. I see no reason for departing from anything I said in *In re Tong* (1), and I agree that the appeal must be allowed.

Appeal allowed.

Solicitors for all parties: *Timbrell, Deighton & Nichols.*

W. I. C.

CLAUSON J.
1933
May 2, 3.

In re JOICEY.

JOICEY *v.* ELLIOT.

[1933. J. 428.]

Will—Construction—Child en ventre sa mère—Exercise of Power of Appointment to Issue of Appointor born in her Lifetime—Appointment by Will to Father of Grandchild, in the event of Father (a Child of Appointor) dying within Twenty-one Years from Appointor's Death "Leaving issue him surviving"—Grandchild benefited indirectly through Gift to Parent.

A testatrix, in exercise of a power to appoint a trust legacy in favour of her issue born in her lifetime, by her will made in 1910 appointed that the legacy should after her death be held in trust for all or any her children or child who should survive her and attain the age of twenty-one years, if more than one in equal shares; and the testatrix directed that the share of each child should be retained upon trust during the period of twenty-one years from the testatrix's death to pay the income thereof to such child if he or she should so long live, and further that if such child should die within the said period, such share should be held in trust for such person or persons as such child should by will appoint, and in default of appointment (*a*) in the event of such child "leaving issue him or her surviving" in trust for such child absolutely, but (*b*) in the event of such child not leaving issue him or her surviving then such share should go and accrue to the share or shares of any other child or children of the testatrix who should survive her and who should attain the age of twenty-one years, if more than one in equal shares.

The testatrix died on January 12, 1912, leaving (amongst other children who survived her) T., who died intestate on May 11, 1932 (namely, within the said period), without having exercised his power of appointment. T.'s wife, to whom he was married on April 14, 1931, and who survived him, was at the date of his death enceinte and on June 12, 1932, gave birth to a son. The question was whether or not T. died leaving issue him "surviving":—

Held, first, that, as the posthumous child of T. (although unborn at the date of the death of his father T., but born after that date) was in existence en ventre sa mère at that date, that child was issue of T. surviving him, the word "surviving" not being confined to its literal primary sense; secondly, if the inclusion of a child en ventre sa mère within the meaning of the expression "issue him surviving" was conditional upon such child taking a benefit thereunder, that condition was sufficiently fulfilled by the probable (though indirect) benefit to the child through the gift to his parent; with the result that the personal representative of T. deceased was entitled to the share in question.

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(1) [1931] 1 Ch. 202.

Although it be true that, for the purpose of conferring a benefit upon a child en ventre sa mère, such a child would be included in such an expression as "children living" at the death of the propositus, there is no rule of law that such an expression must necessarily be treated as not including a child en ventre sa mère who would not take a benefit by his or her inclusion.

ADJOURNED SUMMONS.

By his will, dated August 6, 1879, John Joicey gave a legacy of 50,000*l.* to each of his daughters, other than his daughter Maud, and also a share of his residuary estate to each of them, including Maud, and settled the same legacies and shares upon trust to pay the income of the same to each such daughter during her life and after her death as to principal and the future income thereof, in trust for all or any the issue of each daughter, including grandchildren and more remote issue born in her lifetime as she should by deed or will appoint with trusts over in default of appointment.

The testator died on August 15, 1881, leaving four daughters, of whom one was Mrs. Rose Elliot.

Mrs. Rose Elliot, by her will dated March 1, 1910, in exercise of the power so conferred upon her by her father's will, appointed that all her share as well original as accruing in the said legacy and residuary estate, and also any other fund over which she might have any power of appointment under her father's will (hereinafter called "the appointed funds"), should after her death be held in trust for all or any her children or child who should survive her and being male should attain the age of twenty-one years or being female should attain that age or marry under it and if more than one in equal shares. The testatrix then provided and directed that the share of the appointed funds to which each or any child of hers should become entitled under the appointment thereinbefore contained should be retained by the trustees upon trust during the period of twenty-one years from the death of the testatrix to pay the income of such share to such child if he or she should so long live. If such child should die within the said period, then the trustees should hold such share and the income thereof in trust for such person or persons and in such manner in all respects as such child should by will appoint. And in default of and subject to any such appointment upon the trusts following, namely: in the event of such child "leaving any issue him or her surviving" in trust for such child absolutely, but in the event of such child not leaving issue him or her surviving, then such share and the income thereof should go and accrue by way of addition to the share or shares in the appointed funds of any other child or children who should survive the testatrix and being male should attain the age of twenty-one years or being female should attain that age or marry under it and if more than one in equal shares. Lastly, it was provided that if such child of the testatrix should survive the said period of twenty-one years the trustees should hold the share or shares, whether original or accrued, of such child in the appointed funds and the income thereof in trust for such child absolutely.

By a codicil to her will dated October 15, 1911, the testatrix provided that in the event of any son of hers surviving her and attaining the age of twenty-one years (an event which happened) the share of any daughter of hers should not exceed the sum of 30,000*l.*

The testatrix died on January 12, 1912, leaving her surviving five children, three sons—namely, Robert Elliot, James K. Elliot, and Thomas W. H. Elliot, and two daughters.

Thomas W. H. Elliot, who was a domiciled Scotsman, died intestate on May 11, 1932, without having exercised his power of appointment under his mother's will. He was married on April 14, 1931, and at the date of his death there was no child born of his marriage, but his widow was then enceinte, and on June 12, 1932, she gave birth to a son.

Accordingly, an originating summons was taken out by the trustees of the testator's will to obtain the determination of the question whether the share of the legacy of 50,000*l*. and of the residuary estate of the testator John Joicey, to the income of which Thomas W. H. Elliot was entitled during the period of twenty-one years from the death of the testatrix, belonged to the defendant James G. G. Leadbitter, as judicial factor on the estate of Thomas W. H. Elliot deceased, and as such the representative of his estate, or whether the said share went and accrued by way of addition to the shares of the defendants Robert Elliot and James Elliot in the said legacy and residuary estate.

The two daughters of the testatrix in the event, which happened, of their brothers surviving the testatrix and attaining the age of twenty-one years, were accordingly not interested in the question.

Howard Wright for the plaintiffs.

Sir Gerald Hurst K.C. and *John W. J. Cremlyn* for the defendant Robert B. Elliot. Thomas Elliot did not die leaving issue him surviving, and consequently Thomas' share upon his death accrued by way of addition to the shares of the testatrix's other sons, Robert and James. The word "survive" imports that the child of Thomas, who had to survive in order to qualify Thomas to take the share, must be living at the death of Thomas—namely, the event which it was necessary for him to survive: *Gee* v. *Liddell.* (1) The maxim "postumus pro nato habetur" is only to be applied in cases where it is for the benefit of the child that it should be applied. In all cases where it is to the advantage of the child he will be considered as in esse: *Millar* v. *Turner* (2) and *Doe* v. *Clarke* (3), where it was held that a child en ventre sa mère was considered, generally speaking, as born for all purposes which are for his own benefit. In *Blasson* v. *Blasson* (4) income was to be accumulated, and when the youngest of the children of A., B. and C. (who should have been born and living at the time of the testatrix's decease) should arrive at the age of twenty-one years, the capital was to be divided among all such children as should be then living; and it was held that a child then en ventre sa mère was only to be treated as a born child when that construction was necessary for the benefit of that child. But in that case (*Blasson* v. *Blasson* (1)) no such necessity arose, the words in question being used for the purpose only of ascertaining a period of time, and were not a description of the children as objects of the trust. The case was approved by the House of Lords in *Villar* v. *Gilbey* (2), which decided that the peculiar rule of construction which compels a Court to hold that a child was born in the lifetime of the parent because it was at that time en ventre sa mère is limited to cases where that construction is necessary for the benefit of the child en ventre sa mère. The expressions "living" and "born" are interchangeable. The present case is covered by the decision of the House of Lords in *Villar* v. *Gilbey.* (2) The decision in *In re Burrows* (3), which was followed by Joyce J. in *In re Griffiths' Settlement* (4), is inconsistent with that of the House of Lords in *Villar* v. *Gilbey.* (2) There is no rule of law compelling a Court to construe the words "issue surviving" in any other than their literal, primary sense: see *Villar* v. *Gilbey* (5), per Swinfen Eady J. Accordingly, Thomas Elliot did not die leaving issue him surviving, because no child of his was living at the date of his death. The rule as to when children en ventre sa mère are to be considered as living and born is stated in Hawkins on Wills, 3rd ed., p. 100, and quoted with approval by Farwell L.J. in *In re Salaman.* (6)

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(1) (1866) L. R. 2 Eq. 341.
(2) (1747) 1 Ves. Sen. 85.
(3) (1795) 2 H. Bl. 399.
(4) (1864) 2 D. J. & S. 665.

Wilfrid Hunt for the defendant James K. Elliot.

Vaisey K.C. and *N. C. Armitage* for the defendant James G. G. Leadbitter, the representative of Thomas Elliot deceased, were not called upon to argue.

CLAUSON J. Mrs. Rose Elliot having a power of appointment under the will of her father over certain funds in favour of any issue of hers born in her lifetime, appointed them to her children attaining the age of twenty-one years or marrying under that age, with a proviso which had the effect of limiting a daughter's share in certain events to a sum less than her equal share, and with a second proviso limiting each child's interest in his or her share. I need not pause over the first of these provisos, but I have to deal with the second of the provisos under which the income of a child's share was, during a period of twenty-one years from the appointor's death, that is, until January 12, 1933, to be paid to the child if he or she should so long live; if the child survived the twenty-one years period, he or she was to take his or her share absolutely; if the child died within the twenty-one years period, his or her share was to go to his or her testamentary appointees, and in default of such appointment was to be held (*a*) if the child left any issue him or her surviving in trust for such child absolutely; while, if the child did not leave any issue him or her surviving, such share was to accrue to the shares of the appointor's other children. It is material to observe that the appointor could not give any direct benefit to issue born after her own death of her children; and if, as appears obvious, she was anxious to tie up her children's shares for as long a period as possible, and yet to leave them free to provide for their issue, she could not do it in a better way than the way which she adopted.

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(1) 2 D. J. & S. 665.
(2) [1907] A. C. 139.
(3) [1895] 2 Ch. 497.
(4) [1911] 1 Ch. 246.
(5) [1905] 2 Ch. 301, 305.
(6) [1908] 1 Ch. 4, 8.

One of her sons, Thomas, married on April 14, 1931; he died on May 11, 1932, that is, within the twenty-one years period, intestate; his wife was delivered on June 12, 1932, of a posthumous son.

In those circumstances, on the true construction of the appointment, am I bound to say that Thomas left no issue surviving him? If I am so bound, I shall have to construe this appointment as providing that, in case Thomas should die without exercising his testamentary power of appointment, his estate is to have his share if a child of his is born before his death and survives him, but is not to have his share if his only child is posthumous. It is strange that a posthumous child should be visited with the penalty of losing all chance of obtaining any benefit, in the event of his father's intestacy, from his father's interest in the appointed funds. If the words which the appointor uses are such that I cannot fairly construe them otherwise than so as to produce this remarkable and absurd result, I must, of course, so construe them.

I must first consider what is the grammatical and ordinary sense of the words which I have to construe in the context in which I find them. In my opinion, "issue surviving a parent A. B." is not an inapt expression to cover the case of a child in being at the death of A. B. and coming to birth after A. B.'s death, though I admit it would not be an apt expression to cover the case of a child in being at the death of A. B. which failed to come to living birth. But it cannot be doubted that the use of the expression to cover such a case as the case before me is a quite possible use of language, even if the expression "survive" might in the strictest sense involve the actual existence of the survivor as a born human being at the date of the death of the person to be survived; and there can be no question that, if an expression has a primary meaning in the strictest sense of language, but a possible though looser secondary meaning, it is open to the Court to adopt the secondary meaning if convinced, as in this case I am convinced, that the adoption of the primary meaning would lead to an absurdity which the author of the document cannot as a reasonable person be supposed to have contemplated. In coming to this conclusion I am fortified by the conclusion come to by Joyce J. in *In re Griffiths' Settlement* (1), where he construed the expression in s. 33 of the Wills Act, "leaving issue living," as covering the case where at the death of the propositus his wife was enceinte of a child who was subsequently born alive. A similar conclusion on the words "issue living" was reached by Chitty J. in *In re Burrows* (2), but on grounds other than those on which I have relied in the present case. It is unnecessary for me to express my view of the question canvassed before me, whether the ground of Chitty J.'s decision has been affected by the judgments of the Lords in *Villar* v. *Gilbey*. (1) The argument presented to me in order to induce me to construe the words "leaving issue him surviving" so as to exclude the case of leaving a child en ventre sa mère was based primarily on the proposition, which is a perfectly correct one, that for the purpose of conferring a benefit upon a child en ventre sa mère, such a child will be included in such an expression as "children living"; but, while that proposition is a correct one, there is, of course, no authority for the proposition that there is a rule of law that such an expression as "children living" cannot be treated as including a child en ventre sa mère, unless such child takes a benefit under the clause. But, further, if the justification for extending the meaning of such an expression to a child en ventre sa mère is to depend upon such child taking a benefit under the clause, I do not see why the principle should be confined narrowly to the case where the child takes a direct benefit and why it cannot fairly be treated as covering the case where the clause, as in s. 33 of the Wills Act and as in the present case before me, is aimed at indirectly benefiting children by giving to their parent a benefit which in the ordinary course is at least not unlikely to enure to the children's advantage.

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(1) [1911] 1 Ch. 246, 252.

(2) [1895] 2 Ch. 497.

I will accordingly declare in the terms of the first part of paragraph 1 of the summons, with the result that the share in question passes to Thomas W. H. Elliot's legal representative.

Solicitors: *Stibbard, Gibson & Co.; Coulson & Coulson; Martineau & Reid; Walker, Martineau & Co.*

(1) [1907] A. C. 139.

H. C. H.

MAUGHAM J.

1933

March 14, 15.

In re PATRICK AND LYON, LIMITED.

[00704 of 1932.]

Company—Winding Up—No Trading Profit—Debentures issued to Director—Winding Up just over Six Months later—" Fraud "—" Fraudulent Purpose "—Dishonesty Essential—Companies Act, 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *s.* 265, *sub-s.* 1 ; *s.* 266 ; *s.* 275, *sub-ss.* 1, 2.

By s. 265, sub-s. 1, of the Companies Act, 1929 : " Any . . . . act relating to property which would, if made or done by or against an individual, be deemed in his bankruptcy a fraudulent preference, shall, if made or done by or against a company, be deemed, in the event of its being wound up, a fraudulent preference of its creditors, and be invalid accordingly."

By s. 266 : " Where a company is being wound up, a floating charge on the undertaking or property of the company created within six months of the commencement of the winding up shall, unless it is proved that the company immediately after the creation of the charge was solvent, be invalid, ..."

By s. 275, sub-s. 1 : " If in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or . . . . for any fraudulent purpose, the court, on the application of the official receiver, or the liquidator or any creditor or contributory . . . . may, ... declare that any of the directors, ... of the company who were knowingly parties to the carrying on of the business in manner aforesaid shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the court may direct."

By sub-s. 2 : " Where the court makes any such declaration, it may . . . . make provision for making the liability of any such director under the declaration a charge on any debt or obligation due from the company to him, ..."

By sub-s. 6 : " . . . . where the declaration under subsection (1) of this section is made in the case of a winding up in England, the declaration shall be deemed to be a final judgment within the meaning of paragraph (*g*) of subsection (1) of section one of the Bankruptcy Act, 1914 " :—

Held, (1.) that in s. 275 the references to " intent to defraud " and to " fraudulent purpose," unlike the words " fraudulent preference " in s. 265, import actual dishonesty ;

(2.) that for the purposes of s. 266 a company is not solvent if it is unable to pay its debts as they become due.

Ex parte Russell (1882) 19 Ch. D. 588 and *London and Counties Assets Co.* v. *Brighton Grand Concert Hall and Picture Palace, Ld.* [1915] 2 K. B. 493 followed.

MISFEASANCE SUMMONS.

The applicants were creditors of the company, which was in liquidation. The first respondent had been a director of the company since its incorporation on June 17, 1929, till July 22, 1932, and his wife was also a director. His son was its secretary and became a director after his father's retirement. The company never made a trading profit. In January, 1932, it was indebted to the first respondent and his wife, and it was arranged that the first respondent should advance to the company 400*l.*, out of which the moneys owing should be discharged. On February 3, 1932, the company authorized the issue of a series of debentures of a total amount of 1000*l.* On February 11, 1932, the company drew a cheque in favour of the first respondent for 339*l.* 16*s.* 7*d.*, and another in favour of his wife for 51*l.* 8*s.* 4*d.* On February 12, 1932, the first respondent paid to the company by cheque 400*l.*, and on the same day four debentures of 100*l.* each, constituting a floating charge, were issued to him. On August 13, 1932, he appointed the second respondent to be receiver under the debentures, and on the same day notices were sent to the company's creditors convening a meeting for August 22 to consider a resolution to wind up. The second respondent had been appointed by the shareholders as liquidator, and at the meeting on August 22 the creditors confirmed the appointment. By this summons, which was issued on October 18, 1932, the applicants asked (inter alia): (1.) for a declaration that the first respondent be personally responsible without any limitation of liability for all the debts or other liabilities of the company or for such part thereof as the Court might direct, on the ground that he had been a party to carrying on the company's business with intent to defraud its creditors; (2.) that provision might be made that any such liability be made a charge on any debt or obligation due from the company to the first respondent; and (3.) that the liquidator might be directed to do all such things as might give effect to any order under paragraph (1.) or paragraph (2.) of the summons. The relief was sought under s. 275 of the Companies Act, 1929. The applicants alleged that after July 1, 1931, the results of trading became progressively worse, and that after February 12, 1932, the company's life was continued, not genuinely for trading purposes, but solely in order to validate the debentures which had been issued to the first respondent, and that the first respondent was a party to the continuance for that purpose. The first respondent denied those allegations. The liquidator submitted to act in all respects as the Court might direct.

A. Grant K.C. and *E. Milner Holland* for the applicants. After the debentures had been issued to the first respondent the company was kept alive, as the first respondent well knew and intended, solely in order to validate them. From the point of view of commercial interests and commercial morality, it would be lamentable if the transaction were allowed to go unpunished. The object of it was to prefer the first respondent. All transactions of that kind have been stigmatized by the Legislature in s. 265 of the Companies Act, 1929, as fraudulent preferences.

J. Norman Daynes K.C. and *Philip J. Sykes* for the first respondent. The declaration for which s. 275, sub-s. 1, of the Companies Act, 1929, provides is merely a declaration that any director coming within the sub-section shall be personally responsible as therein mentioned. In the argument before Eve J. in *In re William C. Leitch Brothers, Ld. (No.* 2) (1), two points were raised by counsel for creditors whose debts were incurred between the earliest date at which the company had no means of paying its debts and the date of the winding up. The first point was that it is not necessary under the section to prove that any particular creditor has been defrauded, and the second, that if the money obtained under the section is not applied in payment of defrauded creditors the director will still be personally liable for the fraud and will continue to be so until the company has paid twenty shillings in the pound. Eve J. did not deal in his judgment with either of those points. The suggestion that the debentures in the present case would be validated by the company's being kept alive for six months after they were issued depends upon the answers to the questions whether the company was solvent on February 12, 1932, and whether the debentures were new money within *In re Matthew Ellis, Ld.* (1) It is for the applicants to prove that the debentures required validating, whether on the ground that the company was insolvent when they were issued or on the ground that they were not a payment in cash: *In re Hayman, Christy & Lilly, Ld.* (2) Sect. 275 of the Companies Act, 1929, is directed solely against fraudulent trading, and there is no evidence in the present case that business has been carried on with intent to defraud. The first respondent is not well versed in business affairs, and all he was concerned to do was to obtain an occupation for his son. There is no evidence that he was a party to the carrying on of the business.

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(1) Ante, p. 261, 263.

G. P. Coldstream for the liquidator. The liquidator submits to act as the Court shall direct, and the Court is asked to make provision for his costs.

A. Grant K.C. in reply. This is an unusual case. The only inference to be drawn from the facts is that there was a scheme to defraud creditors by unduly prolonging the life of the company at a time when there was no reason for doing so. The company lost money from the beginning, never made a profit, and by the end of 1931 had exhausted its reserves. Before then it had been pressed by the creditors and compelled to promise weekly payments. By January, 1932, it could not carry on without fresh capital. The test imposed by s. 44 of the Bankruptcy Act, 1914, is whether persons can pay their debts as they fall due, and that test is adopted in s. 265 of the Companies Act, 1929. If the company had gone into liquidation in January, 1932, there would not have been twenty shillings in the pound for the creditors. Sect. 275 was purposely framed to give the Court the widest possible powers to deal with transactions that will not bear investigation.

MAUGHAM J. I will begin by stating that s. 275 of the Companies Act, 1929, under which relief is claimed, is a

(1) Ante, p. 458. (2) [1917] 1 Ch. 283.

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very remarkable section and one which is by no means easy to construe. I have myself dealt with one aspect of it in *In re William C. Leitch Brothers, Ld.* (1), and my brother Eve has dealt with a second branch of it in *In re William C. Leitch Brothers, Ld.* (*No.* 2). (2) Without repeating anything which my brother Eve has said or I have said in either of those cases, I will express the opinion that the words "defraud" and "fraudulent purpose," where they appear in the section in question, are words which connote actual dishonesty involving, according to current notions of fair trading among commercial men, real moral blame. No judge, I think, has ever been willing to define "fraud," and I am attempting no definition. I am merely stating what, in my opinion, must be one of the elements of the word as used in this section. In my opinion it is not used in the same sense as that in which the word "fraud" is used in s. 265 of the Act. There, following the example set by s. 44 of the Bankruptcy Act, 1914, and by s. 92 of the Bankruptcy Act, 1869, both of which deal with the avoidance of fraudulent preferences, the Legislature has thought fit to state that certain acts are to be deemed a fraudulent preference and to be invalid accordingly. A fraudulent preference within the meaning of the Companies Act, 1929, or the Bankruptcy Act, 1914, whether in the case of a company or of an individual, possibly may not involve moral blame at all. For example, there may be a discrimination between creditors, irrespective of pressure, on grounds with which most people would sympathize. Again, there is nothing in the language of s. 266 of the Companies Act, 1929 (which enables a floating charge created within six months of a winding up to be attacked in certain circumstances), to indicate that the Legislature took the view that the creation of such a charge when the company is insolvent is fraudulent, however blameworthy it may be. That appears from the fact that the right to attack such a floating charge is limited to cases where the company goes into liquidation within six months of the creation of it. Coming to the present case, I think that in exercising jurisdiction under s. 275 the Court, however little it may approve of the conduct of the director who is being attacked, is bound to consider whether he has been guilty of a dishonest fraud, and it is hardly necessary for me to point out that the onus is upon the person who seeks to make good the charge, whether he be the official receiver, or the liquidator, or a creditor, or a contributory.

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(1) [1932] 2 Ch. 71.

(2) Ante, p. 261.

I now turn to the facts. [His Lordship then stated the facts and continued :] A question has been raised as to what "solvent" means in s. 266 of the Companies Act, 1929. It is to be observed that the onus of proving the company's solvency lies upon the debenture holder who is endeavouring to support his floating charge. It is not necessary to say that "solvent" there is limited to one meaning; but in my opinion a company is not solvent within the meaning of s. 266 unless it can pay its debts as they become due. It has been urged that "solvent" means "commercially solvent," and that if, upon balance-sheet figures, a company's assets exceed its liabilities, the company is solvent. I do not accept that view, and in support of my rejection of it I will refer to *Ex parte Russell* (1) and *London and Counties Assets Co.* v. *Brighton Grand Concert Hall and Picture Palace, Ld.* (2) The word "solvent" is used in s. 266 of the Companies Act, 1929, immediately after a section dealing with fraudulent preference, and in construing it the Court has to bear in mind s. 44 of the Bankruptcy Act, 1914, where the preference is defined in relation to a thing done or suffered by a person "unable to pay his debts as they become due from his own money." My opinion, therefore, is that under s. 266 the debentures in the present case might well have been attacked if the liquidation had commenced at a date within the period of six months from their creation, and there is evidence to support the view that, during the latter part of the period in question, the persons in charge of the company's destinies were deliberately delaying sending out notices to wind up the company, in order that the period of six months should so expire. That is, no doubt, not a high-minded course of

(1) 19 Ch. D. 588.

(2) [1915] 2 K. B. 493.

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action. On the other hand, it is not high-minded for a person who is forming a company to form it with a very small share capital and to cause the company to purchase his stock in trade by an issue of debentures to himself; but that has never yet been held to be fraud, and for some reason which I do not understand it has not been prohibited by the Companies Acts.

The question which I have to determine is whether, within the meaning of s. 275 of the Companies Act, 1929, and construing the reference therein to fraud as I construe it, the business of the company was carried on for a fraudulent purpose. In my opinion, on the whole, I am not justified in coming to such a conclusion. The business of the company, so far as it was carried on during the latter part of its career, was carried on in order to clear up the position by getting in debts and by effecting sales of stock, and not with a view to securing by purchases on credit assets available as security for debentures. I am not clear in my mind that the first respondent was deliberately intending to carry out any fraudulent purpose or to defraud creditors. That is a matter which cannot be left to conjecture. I must be perfectly satisfied that there is enough evidence to justify the charge. To my mind the case has not been made out and I dismiss the summons.

With regard to the costs, I do not accept all the first respondent's answers. He was defending himself, but the precise truth would have been better than rash statements. Further, it was not a proper act on his part to procure payment of his director's fees by an issue of debentures when the company could not pay even small sums to its creditors. Accordingly, it seems to me a case in which the summons should be dismissed as regards him without costs. The applicants, however, must pay the liquidator's costs.

Solicitors: *J. C. Fox, Gamble & Son; Collyer-Bristow & Co., for Forsyth, Bettinson & Co., Birmingham.*

K. R. A. H.

In re PENROSE.

PENROSE *v.* PENROSE.

[1932. P. 2788.]

LUXMOORE J.

1933

Jan. 26, 27, 31; *Feb.* 3, 6, 17.

Will—Residue—Power of Appointment—Power to Donee to appoint by Deed among Issue (immediate or remote) of his Father—Appointment by Donee to Himself—Claim for Estate Duty—Donee an Object of the Power—Whether "competent to dispose"—Effect at Donee's Death on Residuary Estate then subject to Trusts of Will of Creator of Power—Finance Act, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 5, *sub-s.* 2; *s.* 22, *sub-s.* 2 (*a*).

By her will E. J. P., a married woman, gave devised and bequeathed all her residuary real and personal estate to her trustees upon trust to pay the income thereof to her husband J. D. P. for his life and from and after his death upon trust for (inter alia) such of the following persons as her said husband should by deed or will appoint—namely, any issue (immediate or remote) of her husband's late father subject to the rule against perpetuities. In default of the exercise of the power and subject to any partial exercise thereof the testatrix declared that her residuary estate should be held in trust for her four named sons as therein mentioned. The testatrix having died was survived by her husband, who by a deed poll executed shortly afterwards purported to appoint a certain sum of the testatrix's residuary estate to himself. He subsequently died, and on his death the question arose what estate duty became payable in respect of the residuary estate of the testatrix.

The point having arisen whether under the circumstances and having regard to the power of appointment given to the husband by the will of the testatrix he was a person "competent to dispose" under the Finance Act, 1894, s. 5, sub-s. 2, of the said residuary real and personal estate; and whether, therefore, this residuary estate and the moneys which he purported to appoint under the deed poll were liable for any and if so what estate duty, an originating summons was taken out by his trustees for the purpose (inter alia) of determining this question:—

Held, that the husband was himself an object of the power and could, after the death of the testatrix, appoint to himself the whole of the fund by deed. Further that he was a person "competent to dispose" within the meaning of the Finance Act, 1894, s. 5, sub-s. 2, and that therefore estate duty became payable on his death in respect of such part of the testatrix's residuary estate as then remained subject to the trusts of her will.

Taylor v. *Allhusen* [1905] 1 Ch. 529 considered.

ORIGINATING SUMMONS.

By her will dated March 5, 1930, the Honourable Elizabeth Josephine Penrose (hereinafter called "the testatrix"), after

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appointing her husband James Doyle Penrose her two elder sons Alexander Peckover Doyle Penrose and Lionel Sharples Penrose and one Francis Ransom executors and trustees thereof and after bequeathing certain specific and general legacies devised and bequeathed all lands tenements and hereditaments of whatsoever tenure situate in the County of Hertford of which she should at her death be entitled to dispose unto her husband during his life without impeachment of waste and free of all death duties arising on her death and on the death of her said husband she devised and bequeathed the same to her trustees upon the trusts thereinafter declared of and concerning her residuary estate.

And the testatrix after making a further devise of certain hereditaments and lands in the counties of Norfolk and Suffolk of whatsoever tenure to which she was entitled under the will of her father the Right Honourable Alexander Baron Peckover of Wisbech or such of the same hereditaments and lands as she should at her death be entitled to dispose of and all other lands in the same counties belonging to her at her death or over which she should have a general power of appointment unto her four sons therein named successively as therein more specifically mentioned—namely, the said Alexander Peckover Doyle Penrose and Lionel Sharples Penrose; Roland Algernon Penrose and Bernard Edmund Penrose, she devised and bequeathed all the residue of her real estate of whatsoever tenure and her personal estate and effects whatsoever and wheresoever (including all property whether real or personal over which she should at her death have a general testamentary power of appointment) unto her trustees upon trust for sale calling in or collection and conversion thereof with a power of postponement. And after directing the payment out of the proceeds of such sale or conversion or the moneys forming part of her estate of all her debts and funeral and testamentary expenses and the legacies thereinbefore or by any codicil thereto bequeathed and after making provision for the payment of all duties for which her estate was liable and the duties in respect of any dispositions thereof and of any codicil thereto which were made free of such duties she directed her trustees to invest the residue of the proceeds and other moneys as aforesaid and to hold such proceeds moneys and investments and all other her residuary real and personal estate until sale (all of which was thereinafter referred to as her "residuary estate") upon the trusts following—namely: "(*a*) Upon trust to pay the income thereof to my said husband during his life (*b*) From and after the death of my said husband upon trust for such of the following persons or purposes and in such shares if any and upon such trusts if any and with such powers and provisions as my said husband shall by any deed or deeds with or without power of revocation and new appointment or by will or codicil appoint that is to say: (1.) Any issue (immediate or remote) of my said late father Lord Peckover subject only to the rule against the creation of perpetuities. (ii.) Any issue (immediate or remote) of his my said husband's late father James Doyle Penrose subject to the same rule. (iii.) Any charitable purposes falling within the legal conception of 'Charity.' But in default of the exercise of this power and subject to any partial exercise thereof my residuary estate shall be held in trust in equal shares for such of my four sons Alexander Peckover Doyle Penrose Lionel Sharples Penrose Roland Algernon Penrose and Bernard Edmund Penrose as shall survive me and the legal personal representatives of such of them as shall die before me leaving lawful issue surviving me as part of the estate of such deceased son and to be disposed of and dealt with accordingly Provided nevertheless and I hereby declare that no son of mine (or his personal representatives) who or any of whose issue shall take any part or share of my residuary estate under any appointment made by my said husband shall be entitled to share in the unappointed part thereof without bringing the share so appointed to him or his issue into hotchpot" and the said will contained a hotchpot clause and other provisions not material to be here stated.

The testatrix died on July 30, 1930, without having revoked or altered her said will, which was duly proved on December 18, 1930, in the Principal Probate Registry by the plaintiffs

Alexander Peckover Doyle Penrose and Lionel Sharples Penrose, the said Francis Ransom having renounced probate and power being reserved to the husband James Doyle Penrose to come in and prove, which he never did. By a deed poll dated July 29, 1932, the said Francis Ransom disclaimed the trusts of the testatrix's will. The testatrix had four children only—namely, the plaintiffs to the summons the said Alexander Peckover Doyle Penrose and Lionel Sharples Penrose and the above mentioned Roland Algernon Penrose and Bernard Edmund Penrose, all of whom had attained full age at the date of the summons.

By a deed poll dated May 16, 1931, James Doyle Penrose, the husband of the testatrix, in purported exercise of the power of appointment contained in her will, irrevocably appointed that the trustees of the said will should raise out of the testatrix's residuary estate and pay to himself and each of his four sons certain sums therein specifically mentioned.

By another deed poll also dated May 16, 1931, James Doyle Penrose in further exercise of the power of appointment contained in the will appointed that immediately after his death and in the meantime subject and without prejudice to his own life interest therein and to a power of revocation therein (which he never exercised) the trustees or trustee should hold the whole of the residue then remaining unappointed of the testatrix's residuary estate or of the investments for the time being representing the same and the income thereof in trust for his four sons in equal shares.

James Doyle Penrose died on January 2, 1932, having by his will appointed his wife the testatrix, who predeceased him, his son, one of the plaintiffs, the said Alexander Peckover Doyle Penrose and his (the testator's) brother Alfred Ernest Penrose, a defendant to the summons, executors and trustees thereof.

The Commissioners of Inland Revenue thereupon claimed that in the above circumstances estate duty was payable at a certain rate in respect of the testatrix's residuary personal estate which passed on her death and at a slightly lower rate on her real estate, and that in addition estate duty was payable on the same property as passing on the death of the said James Doyle Penrose on the ground that under the power of appointment conferred upon him by the will of the testatrix he was "competent to dispose" of the said residuary estate within the meaning of the Finance Act, 1894, s. 5, sub-s. 2, and the definition of "competent to dispose of property" contained in s. 22, sub-s. 2 (*a*), of the same Act. (1)

An originating summons was accordingly taken out by the above mentioned Alexander Peckover Doyle Penrose and Lionel Sharples Penrose as executors of the will of the testatrix for the determination (inter alia) of the questions whether James Doyle Penrose was an object of the power of appointment thereby created in his favour and whether upon the true construction of the testatrix's will and of the above mentioned Act the said James Doyle Penrose was at the date of his death or had been during the continuance of the settlement created by the will of the testatrix a person competent to dispose within the meaning of the Finance Act, 1894, s. 5, sub-s. 2 (1), of the whole or any and if so what part or parts of the residuary estate of the testatrix and whether therefore estate duty became payable on his death in respect of the whole or any and if so what part or parts of the said residuary estate of the testatrix and the sum or sums appointed or purporting to have been appointed by the above mentioned deed poll. By agreement between all parties the Commissioners of Inland Revenue were made defendants to the summons.

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(1) Finance Act, 1894, s. 5, sub-s. 2: "If Estate duty has already been paid in respect of any settled property since the date of the settlement, the Estate duty shall not, nor shall any of the duties mentioned in the fifth paragraph of the First Schedule to this Act, be payable in respect thereof, until the death of a person who was at the time of his death or had been at any time during the continuance of the settlement competent to dispose of such property."

Sect. 22, sub-s. 2: "For the purposes of this Part of this Act—(*a*.) A person shall be deemed competent to dispose of property if he has such an estate or interest therein or such general power as would, if he were sui juris, enable him to dispose of the property, including a tenant in tail whether in possession or not; and the expression 'general power' includes every power or authority enabling the donee or other holder thereof to appoint or dispose of property as he thinks fit, whether exerciseable by instrument inter vivos or by will, or both, but exclusive of any power exerciseable in a fiduciary capacity under a disposition not made by himself, or exerciseable as tenant for life under the Settled Land Act, 1882, or as mortgagee."

Sir Arthur Underhill for the summons.

Gavin T. Simonds K.C. and *C. E. Harman* for the defendants, the two younger sons of the testatrix, Roland A. Penrose and Bernard E. Penrose. It is submitted that as a matter of construction the husband who was the donee of the power was not also an object of it. Further, if this submission is wrong, he was not a person " competent to dispose " of the residue within the meaning in the Finance Act, 1894.

The power is a special power and the donee cannot appoint to himself: Farwell on Powers, 3rd ed., chap. X., p. 457, and see pp. 555, 556. Has the testatrix in the present case expressed her intention that her husband, the donee, should be both donee and an object of the power? *Taylor* v. *Allhusen* (1) should be considered, and see *Tharp* v. *Tharp* (2) and *In re Sinclaire's Estate.* (3) On principle in a power of the kind now before the Court, some such words as " excluding himself " should be read into it. If, however, the contention that the husband was not an object of the power is wrong and he might have appointed to himself, then the question arises, was he a person " competent to dispose " of the property. If so, then duty became payable. It is submitted he was not: Finance Act, 1894, s. 5, sub-s. 2 (4); see the definition of " a person . . . . deemed competent to dispose of property " in s. 22, sub-s. 2 (*a*). (4) The law clearly recognizes a distinction between " property " and " power," and in the present case he had no general power. Had he got a limited power within that definition? It is submitted he had not, because he had no power until something had happened. Somewhat by way of analogy, compare *In re Rush.* (5) Even if the husband had power to appoint to himself, yet, as he has not strictly done so, he was not therefore competent to dispose of it.

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(1) [1905] 1 Ch. 529.
(2) [1916] 1 Ch. 142, 152.
(3) (1867) I. R. 2 Eq. 45, 47.
(4) See note (1) ante, p. 797.
(5) [1922] 1 Ch. 302, 308.

The power was one to appoint by deed or will and there is no doubt that he could not appoint by will, because the power could not be exercised by his executor, and therefore there was no object of it. Further, a fraud on the power could be committed, and therefore it is a special power and not a general power. If, therefore, you could commit a fraud on the power it is exercisable in a fiduciary capacity: Farwell on Powers, 3rd ed., p. 458. On the meaning of the words "competent to dispose," see Lord Sterndale M.R. in *Attorney-General* v. *Astor*. (1)

H. B. Vaisey K.C. and *E. M. Winterbotham* for the defendant, Alfred Ernest Penrose, the legal personal representative of the husband, James Doyle Penrose. They adopted the previous argument.

J. H. Stamp for the Commissioners of Inland Revenue. On the second point—namely, "competent to dispose," it is submitted that James Doyle Penrose came within s. 22, sub-s. 2 (*a*), of the Finance Act, 1894 (2), by reason of the power given him by the testatrix; he could have disposed of the property mentioned in the power as he thought fit; there could be no question of fiduciary capacity. The testatrix authorized him if he thought fit to benefit any of the descendants of certain named persons. It is said that it is a special power and is therefore fiduciary, but that really begs the question. The creator of a power can say what he empowers to be done with it, and one has to look and see that what the donee does comes within the ambit of the power. The main authority is *Taylor* v. *Allhusen* (3), which must be carefully considered. The judge in that case did not depart from the plain meaning of the language used.

It is submitted that the legal effect of the power given by the testatrix is that during the lifetime of the tenant for life he absolutely controlled the income, but he was given a power to take a part of it out of the corpus and appoint it to any one he liked: *In re Byron's Settlement.* (1) You must find out who is the object of the power.

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(1) [1923] 2 K. B. 157, 159, 160.

(2) See note (1) ante, p. 797.

(3) [1905] 1 Ch. 529.

[LUXMOORE J. That is really a question of the construction of each particular will.]

The power is to appoint by deed; on what principle can it be said that James Doyle Penrose is not one of the issue of his father? The class can be easily ascertained. One must endeavour to ascertain whether the document can cut down the class or whether prima facie some principle of law applies. There is no principle by which it can be asserted that there is a rule of law. Here the fact that there is a power to appoint by will cannot affect the construction of the power to appoint by deed.

You have words used in their clear ordinary meaning, you cannot alter the effect of that meaning: see the remarks of Sargant J. in *In re Ellis's Settlement. Wasbrough* v. *Boyce* (2), which may be considered by way of analogy, and the remarks also of Lord Sterndale M.R. in his judgment in the same case in the Court of Appeal. (2) The same case in the House of Lords (2) showed a difference of opinion, whether the words there used were used in a flexible sense or not. The words used were, however, held there to be unambiguous. It has never been held—unless expressly made clear in the document—that "issue" means "all the children of X. except A." Here there are no words of futurity, no ambiguity in the document.

The husband, James Doyle Penrose, is one of the "issue" contemplated by the power, and no context can exclude him from being the lawful issue of his father. The words used are as strong as in the settlement in *Boyce* v. *Wasbrough.* (3) Where an expression cannot mean more than one relevant thing, no amount of context can give it another meaning. In the case now before the Court there is a clear intention to exercise a power of appointment among a class. There are cases where on failure of all the persons

(1) [1891] 3 Ch. 474.

(2) [1920] 2 Ch. 432, 442, 443; [1921] 1 Ch. 230, 240, 241; [1922] 1 A. C. 425, 430, 431, 434.

(3) [1922] 1 A. C. 425.

specifically interested under a will, you have a gift to next of kin: compare *Seifferth* v. *Badham* (1); *Gorbell* v. *Davison*. (2)

The question really is, was he "competent to dispose" within the Finance Act, 1894, s. 5, sub-s. 2; and the definition also in s. 22, sub-s. 2 (*a*), must be considered. (3)

In this case, if he is capable of appointing to himself, then he is "competent to dispose" of the property. For authority in connection with questions connected with legacy duty, see cases of *Platt* v. *Routh* (4) and the judges' opinion in that case (4), and *Drake* v. *Attorney-General*. (5)

H. B. Vaisey K.C. in reply. He referred to *Attorney-General* v. *Astor*. (6) A taxing section of an Act must be clear. The only power given to the husband was a power to dispose of the property, not a power to acquire it. The case does not fall within the ambit of the section. It is a special power ab initio.

Cur. adv. vult.

Feb. 17. LUXMOORE J. The object of this summons is to determine whether estate duty became payable in respect of any and what part or parts of the residuary estate of the late Mrs. Elizabeth Josephine Penrose on the death of her husband, Mr. James Doyle Penrose. It was issued at the request of the Commissioners of Inland Revenue, who are joined as defendants. The substantial question is whether James Doyle Penrose was, either at the date of his death or during the continuance of the settlement created by the will of the testatrix, a person competent to dispose, within the meaning of the Finance Act, 1894, s. 5, sub-s. 2, of the whole or any part or parts of her residuary estate.

By her will, to which I will refer with more particularity later, the testatrix conferred a power of appointment on her husband, James Doyle Penrose. Among the objects of the power was a class of persons described as the issue immediate or remote of the father of the said James Doyle Penrose.

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(1) (1846) 9 Beav. 370, 375.

(2) (1854) 18 Beav. 556.

(3) See note (1) ante, p. 797.

(4) (1840) 3 Beav. 257; 6 M. & W. 756, 766, 788.

(5) (1843) 10 Cl. & Fin. 257.

(6) [1922] 2 K. B. 651; [1923] 2 K. B. 157.

Obviously, apart from any question of construction of the particular will, the husband falls within the description, "issue immediate or remote of his father."

Three questions arise. The first, as I understand the argument, is purely one of law. Could the husband, as donee of the power and being within the class of objects, exercise it in his own favour to the exclusion of all other objects? If the answer is in the negative, the other questions are immaterial. If, on the other hand, it is in the affirmative, the second question arises—namely: Is the husband, on the true construction of the will, an object of the power? If the answer is in the negative, again no further question arises, but if it is in the affirmative a further question has to be answered: Was the husband, on the true construction of the relevant sections of the Finance Act, competent to dispose of the testatrix's residuary estate or any part of it?

The material facts are as follows: The will is dated March 5, 1930. It contains a direction to the trustees to hold what is defined as "my residuary estate" upon certain trusts set out in clause 9 of the will, which is in the following words: "My trustees shall hold my residuary estate upon the trusts following, viz. (*a*) Upon trust to pay the income thereof to my said husband during his life; (*b*) From and after the death of my said husband upon trust for such of the following persons or purposes and in such shares if any and upon such trusts if any and with such trusts and provisions as my said husband shall by deed or deeds with or without power of revocation and new appointment or by will or codicil appoint, that is to say: (1.) Any issue (immediate or remote) of my late father Lord Peckover subject only to the rule against the creation of perpetuities; (2.) Any issue (immediate or remote) of his my said husband's late father James Doyle Penrose subject to the same rule; (3.) Any charitable purposes falling within the legal conception of Charity." This is followed by a gift in default of appointment and subject to any partial appointment in trust in equal shares for such of the four sons of the testatrix who are named in the will as should survive her and the legal personal representatives of such of them as should die before the testatrix leaving lawful issue surviving her as part of the estate of such deceased sons and to be disposed of and dealt with accordingly. The will contains a hotchpot clause and the usual provisions to be found in a carefully drawn will. There is nothing in the other clauses of the will which can assist in any way in solving any of the questions.

The testatrix died on July 30, 1930, leaving her husband and the four named sons (who are all parties to this summons) her surviving. The husband died on January 2, 1932, having in his lifetime purported to exercise the power of appointment conferred on him in respect of the testatrix's residuary estate by two deeds, each dated May 16, 1931. By the first of these two deeds he purported to appoint comparatively small sums out of the capital to himself and to each of the four sons. By the second deed, subject to his own life interest and to a power of revocation, which he never exercised, he purported to appoint the residue of the testatrix's residuary estate to the four sons in equal shares.

The first question is one of law. It is said that, although this question has been raised in earlier cases, it has never been decided. The earliest case raising the question came before the Chancery Court in Ireland in *In re Sinclaire's Estate.* (1) The testator in that case gave all his real and personal estate to his wife, her heirs, executors and administrators in trust for his wife and the children of their marriage in such shares and proportions and in such manner and form as the wife should by deed in her lifetime or by will or codicil appoint. The wife appointed to herself. In support of that appointment it was argued that the will contained a gift to the wife and children as joint tenants with a superadded power to the wife to determine the quantity of the estate to go to herself and them by an appointment to be made by her. The Court in the result held that on the true construction of the will the wife took a life interest in the estate with

(1) I. R. 2 Eq. 45, 47.

remainder to her children as she should appoint; in other words, the Court decided as a matter of construction that the wife was not an object of the power, but Lynch J. said in the course of his judgment: "Whether, assuming a parent to be at once the donee, and one of the objects of such a power as this, that power could be well executed by the donee giving to himself the whole fund with a nominal exception, raises a question on which I do not express an opinion, but which I should hesitate to decide in the affirmative."

The point was next raised in the English Courts in the case of *Taylor* v. *Allhusen.* (1) It was there held that a lady having a power of appointment among grandchildren, of whom she herself was one, might appoint to herself. The learned judge dealt with the question purely as a matter of construction, but he was referred to *In re Sinclaire's Estate* (2), and he quoted in his judgment and relied on Sir George Farwell's opinion as expressed in his work on Powers. The passage to which reference was made is to be found on p. 492 of the second edition. (3) After commenting on *In re Sinclaire's Estate* (2) and the dictum which I have quoted, the learned author says this: "But it is submitted that the real question in each case is: Has the testator expressed his intention that the same person shall be donee and object? If the intention is clearly expressed, there is no real reason why the donee should not appoint the whole to himself, if the power authorized an exclusive appointment, or fell within Lord Selborne's Act; or with a nominal exception, if it did not authorize such an appointment, or did not fall within the Act."

It is to be observed that the dictum in *In re Sinclaire's Estate* (2) is general and covers the case where the donee is expressed to be the object of the power. In my judgment the decision in *Taylor* v. *Allhusen* (1) in effect rejects this dictum and, accepting Sir George Farwell's criticism of it, decides against it, holding that the question is in reality one of construction and not of invalidity arising out of any fiduciary capacity with which the donee of the power has been invested. The point was again raised in *Tharp* v. *Tharp* (1), but was not decided.

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(1) [1905] 1 Ch. 529.

(2) I. R. 2 Eq. 45.

(3) Third ed., p. 556.

I respectfully agree with the opinion expressed by Sir George Farwell to which I have already referred. Quite apart from the decision in *Taylor* v. *Allhusen* (2), I should have come to the conclusion that there is nothing illegal per se in an appointment by a donee of a power in favour of a limited class of persons appointing to himself if on the true construction of the instrument creating the power the donee is himself a member of the class and not excluded from it.

The question, therefore, arises: Is there anything in the will, construed in the light of all the material circumstances which can properly be taken into consideration, to exclude the testatrix's husband from the prima facie meaning of the words, "the issue immediate or remote" of his father. It is argued that I must, on the true construction of this will, come to the conclusion that the husband is excluded from among the objects of the power, first, because he is constituted the tenant for life of the whole of the fund subject to the power, and the trusts after this life interest are limited to take effect through the medium of the trustees "from and after the husband's death." It is certainly not an unusual thing to find gifts limited after a life interest through the medium of a trust under which the life tenant may in certain events take the whole or a part of the capital, and I think that but little weight can be attached to this argument. It is next said that the form of the power itself suggests that the donee must be excluded from among the objects, first, because the form is that usually employed when conferring what lawyers generally call a special or a limited power and such a power is in its nature fiduciary. This argument really begs the question, because the power can only be fiduciary if the donee is not an object. It is next said that as the power is to appoint by deed or will, it must be predicated of each object of the power that an appointment may be made to him or her, either by deed or by will, and it is pointed out that the donee never could appoint by will to himself. Again I do not think this contention has much force. A power to appoint by deed is different from a power to appoint by will. Each is a separate power. The donee is given both powers in order that he may be able to exercise whichever may be appropriate to the occasion.

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(1) [1916] 1 Ch. 142.

(2) [1905] 1 Ch. 529.

I have dealt with each of these points separately, but if they are taken altogether, and I think this is the proper method of considering them, I am quite unable to find from them such a clear expression of the testatrix's intention as to leave no reasonable doubt but that she intended to exclude her husband from among the objects of the power she was conferring on him. The words, "issue immediate or remote of my husband's father James Doyle Penrose" are clear and unambiguous words. In order to construe these words in any sense other than their prima facie meaning, I must find sufficient context in the will and the admissible evidence of what are called the surrounding circumstances to leave no reasonable doubt in my mind that the testatrix was using the words in some other sense and what that other sense is. I am quite unable to satisfy these conditions. I am therefore bound to hold that on the true construction of the testatrix's will her husband was himself an object of the power. The power is in terms an exclusive power, and I therefore also hold that on the true construction of the will the husband was entitled at any time after the death of the testatrix to appoint by deed the whole of the fund to himself. So far as he did so by what I have called the first deed of May 16, 1931, he made the fund thereby appointed to himself his own, and no further question arises as to this.

So far as the rest of the fund is concerned, the third question is material: What is the meaning of the words "competent to dispose" in the Finance Act, 1894, s. 5, sub-s. 2? The sub-section is in these words: "If Estate duty has already been paid in respect of any settled property since the date of the settlement, the Estate duty shall not, nor shall any of the duties mentioned in the fifth paragraph of the First Schedule to this Act, be payable in respect thereof, until the death of a person who was at the time of his death or had been at any time during the continuance of the settlement competent to dispose of such property." Sect. 22, sub-s. 2 (*a*), contains a definition of the words "competent to dispose." It is in these words: "(2.) For the purposes of this Part of this Act—(*a*) A person shall be deemed competent to dispose of property if he has such an estate or interest therein or such general power as would, if he were sui juris, enable him to dispose of the property, including a tenant in tail whether in possession or not; and the expression 'general power' includes every power or authority enabling the donee or other holder thereof to appoint or dispose of property as he thinks fit, whether exerciseable by instrument inter vivos or by will, or both, but exclusive of any power exerciseable in a fiduciary capacity under a disposition not made by himself, or exerciseable as tenant for life under the Settled Land Act, 1882, or as mortgagee."

It is argued that the power in the present case is a limited power and does not authorize the donee to appoint or dispose of the property subject to it as he thinks fit. It is said that if he appoints to himself he only acquires the property but does not dispose of it, and that his power to dispose of it as he thinks fit does not arise under the power but after he has exercised it in his own favour. In my judgment this is too narrow a construction to place on the words of the definition. A donee of a power who can freely appoint the whole of the fund to himself and so acquire the right to dispose of the fund in accordance with his own volition, is, in my judgment, competent to dispose of that fund as he thinks fit, and it can make no difference that this can only be done by two steps instead of by one—namely, by an appointment to himself, followed by a subsequent gift or disposition, instead of by a direct appointment to the object or objects of his bounty. If under a power the donee can make the whole of the property subject to it his own, he can by exercising the power in his own favour place himself in the position to dispose of it as he thinks fit. The power to dispose is a necessary incident of the power to acquire the property in question. In my judgment, the word "power" in the phrase "a power to appoint or dispose of as he thinks fit," is not used in the definition section in the strict legal sense attaching to it when used with reference to a power of appointment, but in the sense of capacity; and I think this is made clear by the use of the words "or dispose of" in addition to the words "to appoint," because otherwise the words "or dispose of" would be mere surplusage.

In the result I hold that, on the true construction of the relevant sections of the Finance Act, 1894, the testatrix's husband was after her death competent to dispose of the residuary estate, and consequently on his death estate duty became payable in respect of such part of the residuary estate as then remained subject to the trusts of the testatrix's will.

[NOTE.—The plaintiffs entered an appeal from this judgment, but it was not proceeded with, terms of settlement having been agreed upon between all parties.]

Solicitors: *Waterhouse & Co.; Solicitor to the Inland Revenue.*

A. R. T.

NATHAN *v.* GULKOFF AND LEVY, LIMITED.

BENNETT J.
1933
May 3, 4.

Master and servant—Wages—Minimum wage—Trade Board—Piece-work—Worker unable to earn minimum wage owing to insufficient supply of work—Trade Boards Act, 1909 (9 *Edw.* 7, *c.* 22), *ss.* 4, 6—*Trade Boards Act,* 1918 (8 *&* 9 *Geo.* 5, *c.* 32), *s.* 8—*Fur Trade Orders.*

A worker, employed as a nailer in the fur trade, who was paid on a piece-work basis, was, during a period between November, 1927, and December, 1930, not supplied by his employers with a sufficient quantity of work to enable him to earn the minimum piece-work basis rate of 1*s.* 8*d.* an hour to which he was entitled under Statutory Orders made in accordance with the provisions of the Trade Boards Acts of 1909 and 1918:—

Held, that he was entitled to an account on the footing that in respect of each hour of his employment during the period in question he was to be paid a minimum wage of 1*s.* 8*d.*

ACTION.

The defendants, who were manufacturing furriers, employed the plaintiff as a nailer. From 1927 until his dismissal in 1931 he was paid on a piece-work basis, and became entitled, as from November, 1927, to receive and the defendants became liable to pay to him as a minimum the wages paid for a nailer under the Schedule to a Statutory Order of November 4, 1927 (subsequently affirmed by a further Order of May 9, 1930), made under the Trade Board Acts, 1909 and 1918. The minimum piece-work basis rate payable to him was 1*s.* 8*d.* an hour. The plaintiff commenced an action against the defendants asking that an account might be taken of arrears of wages alleged to be due to him from the defendants in respect of the above period, and for payment of the arrears found due to him. He alleged that during the period in question he was not paid for piece-work done by him sums which enabled him to earn the minimum wages based upon the minimum piece-work basis rate applicable to a worker having his experience and qualifications.

Henry H. Harris for the plaintiff. The plaintiff is under para. 38 of the Statutory Order of May 9, 1930 (1), entitled to

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(1) Para. 38 of the Statutory Order of May 9, 1930, was as follows:—
"Workers Employed on Piece Work. In the case of workers who are employed on piece work, for which no general minimum piece rates have been fixed by the Trade Board and made effective, each piece rate paid

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be paid an amount not less than the appropriate piece-work basis time rate applicable. That amount, for a workman having his qualifications, is fixed by para. 3 of the Order at 1*s.* 8*d.* an hour.

H. H. Weingott for the defendants. The plaintiff is not entitled to the account which he claims as, owing to the fact that he is a slow worker, he is not "an ordinary worker, *i.e.*, a worker of ordinary skill and experience in the class of work in question," within the provisions of para. 38 of the Schedule to the Order of May 9, 1930. The only section of the Act of 1918 which may be of assistance is s. 8.

[He also referred to s. 6 of the Act of 1909.]

Harris in reply.

BENNETT J. This is an action by Mr. Solomon Nathan against a limited company (Gulkoff & Levy, Ld.) for an account of the arrears of wages alleged to be due to him from the defendants between November 7, 1927, and July 13, 1930, the plaintiff's claim being based upon the provisions of the Trade Boards Acts of 1909 and 1918 and two Statutory Orders made in accordance with the provisions of these Acts. The trade in which the plaintiff was employed was the fur trade, and, under the provisions of the Acts of 1909 and 1918, Orders have been made, one on November 4, 1927, having effect from November 7, 1927, and the other on May 9, 1930, having effect from May 12, 1930, fixing the minimum wages to be paid by an employer to persons employed in the fur trade in Great Britain, and it has been admitted on behalf of the defendants that they were bound to pay to the plaintiff wages in accordance with these statutory regulations. If they have not paid to the plaintiff during the period covered by the statutory regulations the minimum wage to which

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must be such as would yield, in the circumstances of the case, to an ordinary worker, *i.e.*, a worker of ordinary skill and experience in the class of work in question, an amount not less than the appropriate piece-work basis time rate applicable, or, where no piece-work basis time rate has been fixed by the Trade Board and made effective, an amount not less than the appropriate general minimum time rate."

the plaintiff was entitled thereunder, the plaintiff is entitled to recover from them the difference between the wages actually paid and the minimum wage. The plaintiff is what is known as a "nailer," and he entered the employment of the defendants in the year 1922 in that capacity. His wages when he first entered their employment were weekly wages, and the wage which he then received was the sum of 4*l.* per week. The defendants in 1924 increased his weekly wage to 4*l.* 5*s.* a week, and continued to pay him at that rate till 1927, when instead of paying their employees weekly wages they began to pay them for piece-work.

In those circumstances, when the Statutory Order of November 4, 1927, became effective, as from November 7, 1927, the plaintiff became entitled to receive and the defendants became liable to pay as a minimum the wages fixed for a nailer by the First Schedule to that Order, and, from May 12, 1930, the minimum wages fixed for a nailer by the First Schedule to the Order of May 9, 1930. There is no difference so far as this action is concerned between the relevant provisions in the two Orders, and, therefore, I propose to refer to the provisions of the Order of May 9, 1930, only. It is common ground between the parties that the plaintiff was a nailer as defined by para. 4 of the First Schedule to that Order. It is also common ground that the plaintiff was a nailer who had the experience and the qualifications which, under para. 3 of that Order, entitled him to a piece-work basis time rate of 1*s.* 8*d.* per hour, and that, therefore, his right was regulated by para. 38 of the First Schedule to that Order. Para. 38 is in the following terms: [His Lordship read the paragraph, and continued:] Now the plaintiff has kept a record of the wages he received and the number of hours he worked between September, 1930, and July 13, 1931, that being the date upon which he was dismissed by the defendants, and that record establishes the fact that in that period he was not paid for the piece-work done by him sums enabling him to earn the piece-work basis time rate applicable to him. The answer which the defendant company makes to the plaintiff's claim is that the plaintiff was a slow worker and was, therefore, not a workman of ordinary skill and experience in the class of work in which he was employed and that, therefore, he is not within the provisions of para. 38 of the Schedule to the Order. In substance, I think, that is their defence. Now I am quite satisfied upon the evidence that the plaintiff was a worker of ordinary skill and experience in the class of work in which he was employed. I am satisfied that he was not an unusually slow worker. He was not, I think, a worker who would have been asked by the defendants to nail their highest class of work, and the reason why the piece-work done by him was not sufficient to enable him to earn the minimum wage which the Statutory Order entitled him to be paid was because the defendants had not a sufficient volume of the class of work which the plaintiff was fitted to do to enable him to earn the minimum wage which he was entitled to. In other words, they had not a sufficient quantity of skins to put into his hands which, at the price they fixed, would enable him to earn his minimum wage.

In these circumstances, what are the plaintiff's rights? I am satisfied that if the defendants had had the volume of work to give to the plaintiff and had given it to him the piece rate fixed by the defendants for the work which they gave the plaintiff to do would have been sufficient to yield to the plaintiff the piece-work basis time rate applicable to him, and I am satisfied that the plaintiff's capacity was such as to enable him to earn his minimum wage. In my judgment, the only reason why the plaintiff did not receive it was because the defendants had not the volume of work to give him. It seems to me in these circumstances that it is not possible to say that the piece rates fixed by the defendants for the pieces of work which they did give the plaintiff were sufficient in the circumstances to yield him, he being a workman of ordinary skill and experience, the piece-work basis time rate applicable to the plaintiff and to which under the regulations he was entitled.

I think the defendants were bound in those circumstances, so far as the plaintiff was concerned, he not being a workman

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whom they were prepared to entrust with their highest class of work, to raise the piece rate for the particular pieces of work which they put into his hands for him to do. That seems to me to be the effect of para. 38 of the First Schedule to the Order of May 9, 1930. The result is that, in my judgment, the plaintiff has established his case and is entitled to an account of the arrears of wages due to him from the defendants from November 7, 1927, to July 13, 1931, upon the footing that in respect of each hour of his employment during that period he was to be paid the minimum wage of 1*s*. 8*d*. per hour. The plaintiff must have the costs of the action down to and including the date of this order and the costs of taking the inquiry will be reserved.

Solicitors: *J. Trevor Booth; Morrish, Strode & Searle.*

J. L. D.

Followed. Bacon *v.* Grimsby Corpn.
[1950] 1 K. B. 272

Applied. Bacon *v.* Grimsby Corpn.
[1949] 2 All E.R. 875.

COHEN *v.* WEST HAM CORPORATION.

[1932. C. 4073.]

C. A.
1933
MAUGHAM J.
March 2.
C. A.
May 5.

Local Government—Housing—Insanitary Houses—Statutory Notices to execute Works—Statutory Right of Appeal—Right not Exercised—Discretion of Local Authority as to Works specified in Notices—Enforcement of Notices—Housing Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 39), *s.* 17, *sub-s.* 1; *s.* 18, *sub-ss.* 1, 2; *s.* 19; *s.* 22, *sub-ss.* 1, 5.

By s. 17, sub-s. 1, of the Housing Act, 1930: "Where a local authority, upon consideration of an official representation, or a report from any of their officers, or other information in their possession, are satisfied that any dwelling-house which is occupied or is of a type suitable for occupation by persons of the working classes is in any respect unfit for human habitation, they shall, unless they are satisfied that it is not capable at a reasonable expense of being rendered so fit, serve upon such person as is hereinafter mentioned a notice requiring him, within such reasonable time, not being less than twenty-one days, as may be specified in the notice, to execute the works specified in the notice and stating that, in the opinion of the authority, those works will render the house fit for human habitation."

By sub-s. 2: "A notice under this section shall be served upon the person who receives the rack rent of the house, ... or who would . . . . receive it if the house were let at a rack rent, and that person is in this part of this Act referred to as the person having control of the house."

On April 1, 1932, the Council's medical officer of health, acting under s. 17, reported to their Housing Committee that seven houses were unfit for human habitation and capable at a reasonable expense of being rendered fit: the Committee reported that, having considered that representation, it recommended service upon the landlords of notices under the section requiring the execution of works upon the houses; on April 26 the Council adopted the Committee's report, and on April 28 seven notices were served on the owner's agents (the persons "having control" within s. 17, sub-s. 2) requiring them within fifty-six days to execute the works therein specified. The plaintiff, who knew that the notices had been served, bought, on or about September 8, 1932, four of the seven houses, on which none of the works specified in the notices served in respect of them had yet been done. A requirement in one notice was "to take down and re-build the front, back main and back addition walls where necessary; . . . . rake out and re-point the walls of the water-closet, ..."; another, in two notices, was to "take down and re-build the front and back addition walls where necessary and re-point the remainder of walls (*sic*) where necessary"; and another, in the fourth notice, was to "take down and re-build the front, back addition and water-closet walls where necessary; . . . . re-point around reveals of front door; . . . ." The plaintiff did work on all the houses but rebuilt no walls (though he repointed all or most of them), and all the work that he did was finished by October 14. He contended that he had complied with the notices, which the Council denied: and there was evidence that the Council's senior sanitary inspector stated that the Council would enter upon the houses, rebuild the walls, and take off the roofs. The plaintiff did not appeal to the county court against the notices, as he could have done under s. 22 of the Act, with the result that they became, under that section, operative on the expiration of twenty-one days after service and final and conclusive as to any matters which could have been raised on such an appeal. He alleged that they were invalid, on the ground that there was no sufficient proof that the Council had properly considered what it was necessary for them to consider under s. 17 of the Act before serving them. He accordingly commenced the present action, claiming declarations that the notices were invalid, and that the Council were not entitled to enter upon the houses, to pull down their walls or to take off their roofs, and an injunction to give effect to the declarations. Evidence was given for the plaintiff that the use of the words " where necessary " in notices of the kind before the Court, though not unusual, was not common :—

Held, by Maugham J., (1.) that the notices were valid and that the plaintiff could not contend that they were not, as he had not appealed against them ;

(2.) that local authorities must exercise discretion as to the nature of works to be specified in notices served under s. 17, sub-s. 1, of the Act, which they can do through their appropriate committees or persons chosen thereby ;

(3.) that the notices required the plaintiff to take down and rebuild only those parts of the walls which needed rebuilding ;

(4.) that local authorities have no power, under s. 18 of the Act (relating to the enforcement of notices served under s. 17, sub-s. 1), to enter upon and do work in dwelling-houses, or give notice in writing of intention to do so, unless non-compliance with notices given under s. 17, sub-s. 1, can be shown, and that the plaintiff was therefore free to prove, if he could, that he had complied with the notices, and thus prevent the Council from proceeding under s. 18.

Hall v. *Manchester Corporation* (1915) 79 J. P. 385 ; [1915] W. N. 192 considered and distinguished.

On appeal as to the validity of the notices :—

Held, by the Court of Appeal (affirming on this point the decision of Maugham J.), that, in the absence of any evidence one way or another, the Court would not assume that the Council had not properly discharged the duties imposed upon them by s. 17 of the Act, that the proper course for the plaintiff to adopt if he challenged the validity of the notices was to appeal to the county court under s. 22 of the Act within the twenty-one days thereby limited, and that as he had not done so the notices must be regarded as valid notices under s. 17.

WITNESS ACTION.

This was an action for a declaration that certain notices, served by the Council of the Borough of West Ham (hereinafter called "the Council") under s. 17, sub-s. 1, of the Housing Act, 1930, and requiring the execution of the works specified therein upon certain houses, were invalid, a declaration that the Council was not entitled to enter upon the houses or to pull down their walls or take off their roofs, and an injunction to give effect to the declarations.

In April, 1932, Mr. R. E. Miller was the owner of certain houses for the working classes numbered 2, 4, 6, 8, 10, 12, and 14 Myra Street, West Ham, and Messrs. Herapath Brothers were his agents for collecting the rents thereof. On April 1, 1932, the Council's medical officer of health made a report to their Housing Committee, clause (*d*) of which was: "Under s. 17 of the Housing Act, 1930, I report the following houses as being in certain respects unfit for human habitation and capable at a reasonable expense of being rendered fit:—Nos. . . . . 2, 4, 6, 8, 10, 12, 14 Myra Street, West Ham." The Committee reported that, having considered the representation contained in clause (*d*), they recommended that notices under s. 17 of the Housing Act, 1930, be served upon the landlords, requiring them, within reasonable time, not being less than twenty-one days, to execute such works as would render the houses fit for human habitation. At a meeting held on April 26, 1932, the Council resolved that the Committee's report be received and adopted and its recommendations carried into effect. On April 28, seven notices were served on Messrs. Herapath Brothers, who, as agents for Mr. Miller, were the persons "having control of" the houses within the meaning of s. 17, sub-s. 2, of the Housing Act, 1930. The notices were on printed forms, and were headed "Housing Act, 1930. Notice requiring the Person having control of a Dwelling-House to execute Works under s. 17 of the Housing Act, 1930." Then followed the words: "To   the person having control of the dwelling-house   in the County Borough of West Ham," and in each case this part of the notice was completed by typing the name and address of Messrs. Herapath Brothers after the word "to" and the name "Myra Street" preceded by the appropriate number after the word "dwelling-house." The printed form continued: "Take notice:—(1.) That the Council of the County Borough of West Ham (hereinafter referred to as 'the Council') are satisfied that the above mentioned house which is occupied or is of a type suitable for occupation by persons of the working classes, is unfit for human habitation in the respects hereinafter mentioned; (2.) That the Council are not satisfied that it is incapable at reasonable expense of being rendered fit for human habitation; (3.) That in pursuance of Sub-section (1.) of s. 17 of the Housing Act, 1930, the Council require you within a period of days ending on the day of , 193 to execute the following works, which will in the opinion of the Council render the house fit for human habitation, namely:— . . . ." The period, which was in each case fifty-six days, and the date, which was in each case June 25, 1932, were typed in the third paragraph in each notice. The remainder of the material part of each notice was typed.

On or about September 8, 1932, Mr. Miller sold Nos. 4, 10, 12 and 14 Myra Street to the plaintiff, who thereupon became "the person having control" of those four houses within s. 17, sub-s. 2, of the Act, and who knew when he bought the houses that the notices had been served. In the notice in respect of No. 4 was a requirement to "take down and re-build the front, back main and back addition walls where necessary; . . . . rake out and re-point the walls of the water-closet, ..."; in those in respect of Nos. 10 and 12 a requirement to "take down and re-build the front and back addition walls where necessary, and re-point the remainder of walls (*sic*) where necessary"; and in that in respect of No. 14 a requirement to "take down and re-build the front, back addition and water-closet walls where necessary; . . . . re-point around reveals of front door; . . . ." At the date of the sale to the plaintiff none of these works had been done. The plaintiff had certain work done on all four houses, but did not rebuild any of the walls (though he repointed all or most of them), and all the work which he had done was completed on or before October 14, 1932. He contended that he had complied with the notices. The Council denied

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that contention; and there was evidence that the Council's senior sanitary inspector stated that the Council would enter upon the houses, rebuild the walls and take off the roofs in order to examine the timbers. Under s. 22 of the Act (1), the plaintiff could have appealed against the notices, but did not do so. The notices thus became, under sub-s. 5 of that section, operative on the expiration of twenty-one days after service, and final and conclusive as to any matters which could have been raised on such an appeal. The plaintiff alleged that they were invalid, on the ground that there was no sufficient proof that the Council had properly considered what it was necessary for them to consider under s. 17 of the Act before serving them: and in this action he claimed (inter alia) (1.) a declaration that the notices were invalid; (2.) a declaration that the Council were not entitled, under the Act or otherwise, to enter upon the four houses or to pull down the walls or take off the roofs thereof; and (3.) an injunction to give effect to the declarations. Evidence was given for the plaintiff that notices requiring walls to be taken down and rebuilt "where necessary" were not unusual, but were not common form.

W. F. Swords K.C. and *Phineas Quass* for the plaintiff. The question arises whether the notices were valid, which is mostly a question of law. If they were valid the work was in fact wholly done and the Council had no right whatever to come upon the premises. Under s. 17, sub-s. 1, of the Act the local authority must do something more than merely register something contained in an officer's report. They must consider for themselves the various matters mentioned in the sub-section, and they must deal with those matters judicially and not leave it to their officers to come to decisions with regard to them. There is a right of appeal against notices served under s. 17, which is given by s. 22. Also s. 18 is important. It relates to the enforcement of notices served under s. 17. (1) The Council's minute-book appears to show that the Council have adopted the report of their medical officer of health. That course is not open to a local authority: *Hall* v. *Manchester Corporation.* (2) There is no sufficient proof that the Council have properly considered the matters which s. 17, sub-s. 1, of the Act requires them to consider. If the Court is against the plaintiff on that point, it is submitted that the plaintiff is entitled to prove that he has complied with the notices and thus prevent the Council from trespassing on his property.

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(1) Sect. 22, sub-s. 1: "Any person aggrieved by—(*a*) a notice under this Part of this Act requiring the execution of works; (*b*) a demand for the recovery of expenses incurred by a local authority in executing works specified in any such notice; (*c*) an order made by a local authority with respect to any such expenses; . . . . may, within twenty-one days after the date of the service of the notice, demand or order, ... appeal to the county court within the jurisdiction of which the premises to which the notice, demand, or order relates are situate, and no proceedings shall be taken by the local authority to enforce any notice, demand or order against which an appeal is brought before the appeal has been finally determined: . . . ."

Sub-s. 5: "Any notice, demand or order against which an appeal might be brought to a county court under this section shall, if no such appeal is brought, become operative on the expiration of the period of twenty-one days mentioned in subsection (1) of this section, and shall be final and conclusive as to any matters which could have been raised on such an appeal, ..."

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(1) Sect. 18, sub-s. 1: "If a notice under the last preceding section requiring the person having control of a dwelling-house to execute works is not complied with, then, after the expiration of the time specified in the notice or, if an appeal has been made against the notice and upon that appeal the notice has been confirmed with or without variation, after the expiration of twenty-one days from the final determination of the appeal, or of such longer period as the court in determining the appeal may fix, the local authority may themselves do the work required to be done by the notice, or by the notice as varied by the court, as the case may be."

Sub-s. 2: "Where the local authority are about to enter upon a dwelling-house under the provisions of the last preceding subsection for the purpose of doing any work, they may give to the person having control of the house and, if they think fit, to any other person being an owner of the house, notice in writing of their intention so to do . . . ."

Sub-s. 3: "Any expenses incurred by the local authority under this section . . . . may, ... be recovered by them, ... from the person having control of the dwelling-house or, if he receives the rent of the house as agent or trustee for some other person, then either from him or from that other person, or in part from him and as to the remainder from that other person: . . . ."

(2) 79 J. P. 385; [1915] W. N. 192.

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R. M. Montgomery K.C. and *Maurice FitzGerald* for the Council. The use of the words "where necessary" in notices of this kind is quite common. It is clear from the form of the notices that some parts of the walls need taking down and rebuilding. The notices do not say what parts, because that cannot be ascertained until the work has been commenced. The onus of proving that something which should have been done has been omitted lies upon the plaintiff. There is nothing whatever in the Council's minute-book to show that consideration was not given to every point which it is suggested ought to be considered and determined by a local authority. All that appears in the minute-book with regard to the matter is a bare minute or record. The Court would not hold that the whole body of a local authority ought to reconsider in detail a matter which comes up to it for consideration or confirmation from its proper committee. If the committee has considered the matter, that is proper consideration by the local authority. In the present case there is nothing whatever to suggest that the Council have not fully considered whether the houses were in a proper condition for notices to be given. With regard to that it is necessary to consider what is the obligation cast upon a local authority by s. 17, sub-s. 1, of the Act. In *Hall* v. *Manchester Corporation* (1) a house was declared unfit for human habitation and, as a result, no one might inhabit it. In the present case there have been served merely some notices which may be challenged, or might have been challenged, in a regular way. That was not what happened in *Hall* v. *Manchester Corporation.* (1) The distinction becomes clear on a comparison of s. 17 of the Act with s. 19, which deals with the power of local authorities to order the demolition of insanitary houses. (2) Under

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(1) 79 J. P. 385; [1915] W.N. 192.

(2) Sect. 19, sub-s. 1: "Where a local authority, upon consideration of an official representation, or a report from any of their officers, or other information in their possession, are satisfied that any dwelling-house which is occupied, or is of a type suitable for occupation, by persons of the working classes, is unfit for human habitation and is not capable at a reasonable expense of being rendered so fit, they shall serve upon the person having control of the house, upon any other person who is an owner thereof, and, so far as it is

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s. 17, sub-s. 1, the intention is that a notice shall be given: and the moment it is given it may be challenged in a particular way, not before the local authority but before the county court. In the present case all that the Council ought to do is to consider the representation or report of any officer. If the report is made by an officer of the local authority the position is of course totally different from that in *Hall* v. *Manchester Corporation.* (1) In that case a report had been made by some one who was not an officer of the local authority, so that the decision reached could not be said to be a decision of the local authority. All that a local authority need consider with regard to any given house on which it is proposed to do particular works is whether it can come to a bona fide conclusion that those works will

reasonably practicable to ascertain such persons, upon every mortgagee thereof, notice of the time (being some time not less than twenty-one days after the service of the notice) and place at which the condition of the house and any offer with respect to the carrying out of works, or the future user of the house, which he may wish to submit will be considered by them, and every person upon whom such a notice is served shall be entitled to be heard when the matter is so taken into consideration."

Sub-s. 2: "The authority may if, after consultation with any owner or mortgagee, they think fit so to do, accept an undertaking from him, either that he will within a specified period carry out such works as will in the opinion of the authority render the house fit for human habitation, or that it shall not be used for human habitation until the authority, on being satisfied that it has been rendered fit for that purpose, cancel the undertaking."

Sub-s. 3: "If no such undertaking as is mentioned in the last preceding subsection is accepted by the authority, or if, in a case where they have accepted such an undertaking, any work to which the undertaking relates is not carried out within the specified period, or the house is at any time used in contravention of the terms of the undertaking, the authority shall forthwith make a demolition order requiring that the house shall be vacated within a period to be specified in the order, not being less than twenty-eight days from the date on which the order becomes operative, and that it shall be demolished within six weeks after the expiration of that period or, if the house is not vacated before the expiration of that period, within six weeks after the date on which it is vacated, or in either case within such longer period as in the circumstances the local authority deem it reasonable to specify, and shall serve the order upon every person upon whom they would be required by subsection (1) of this section to serve a notice issued by them under that subsection."

(1) 79 J. P. 385; [1915] W. N. 192.

render the house fit for human habitation. In the present case the notices were properly given. The objection that there had not been proper consideration could have been raised on appeal to the county court. There was no appeal to the county court: therefore the notices cannot now be challenged on the ground of lack of compliance with conditions precedent. It is clear that the Legislature's object is that, if no appeal is raised within twenty-one days, the decisions of local authorities on questions of this kind shall be final. The whole purpose of the scheme is to enable local authorities to enter houses and do work on them. In cases like the present, notices may be challenged on the ground of defect in any of the preliminaries to their presentation, and the county court judge may thereupon quash them. If, however, notices are not challenged within twenty-one days they become final and conclusive with regard to all matters which could have been raised upon them. In the present case the notices are conclusive as to both their validity and their contents, and there can be no proceedings with regard to them in the High Court. Proceedings with regard to notices served under s. 17, sub-s. 1, of the Act have been specifically referred to the county court, and therefore the jurisdiction of every other Court is ousted.

There arises also the question whether the plaintiff can now say that the work has been done and come to the Court for a statement that it has been done, or is bound to wait until an order has been made by the local authority with respect to expenses incurred in executing works specified in the notices and then prove to the county court that he did all the work that was necessary and that any further work done by the local authority was unnecessary. That he may prove when the demand is made upon him for payment. The county court is given a very special jurisdiction with regard to payment on demand, and it is intended that the local authority should have power to determine in the first instance whether in their view the work has been done, and to do at their own risk any further work which they think necessary. The county court judge is clearly given

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jurisdiction to determine whether, in such cases as the one now before the Court, there had been compliance with the notice before the local authority did the work, inasmuch as, when payment is demanded, he must decide whether the cost of the work done is justified.

W. F. Swords K.C. in reply. The Court has jurisdiction to interfere in a case of this kind: *Rayner* v. *Stepney Corporation* (1); *In re Bowman.* (2) On the true construction of the Act there has been no compliance with s. 17, sub-s. 1, and the notices are therefore invalid. Further, the Court has jurisdiction with regard to the sufficiency of the work to be done. All that the county court can do is to determine whether an owner is liable to pay for the work which the local authority has done. In such a case the Court has ample jurisdiction to prevent a trespass by a local authority, and cannot deal with the matter, in the present case, on the footing that there is a custom among architects and surveyors to deal with it in a particular way, because the evidence does not show that that is so.

MAUGHAM J. There are certainly some points of difficulty that arise on this matter, and, if I thought that further consideration would help me to decide them rightly, I would reserve my judgment: but I think it is a case where, perhaps, it would be to the advantage of all parties if I decided the case at once, and left any person who is dissatisfied to go to a higher tribunal.

The plaintiff is one Mark Cohen, who has recently become the owner of four houses, Nos. 4, 10, 12 and 14 Myra Street, West Ham. Before he became the owner, which he did under a contract dated September 8, 1932, there were served on Messrs. Herapath Brothers, the persons "having control of" the four houses in question, within the meaning of s. 17, sub-s. 2, of the Act, four notices given by the Council pursuant to statutory authority, requiring certain works to be done on those four houses. The plaintiff purchased his houses with knowledge that those notices had been served. Certain

(1) [1911] 2 Ch. 312.

(2) [1932] 2 K. B. 621.

works have been done on the four houses. The plaintiff says that these works are a sufficient compliance with the notices: the Council deny it; and the plaintiff has been driven to the Court and claims a declaration that the notices are invalid and, further, a declaration that the Council are not entitled to enter upon Nos. 4, 10, 12 and 14 Myra Street, or to pull down the walls or take off the roofs thereof; and he claims an injunction to give effect to the said declarations and further or other relief.

The notices purport to have been given under s. 17, sub-s. 1, of the Housing Act, 1930. Upon consideration of that sub-section, which I am treating myself as having read in full, the local authority is to act upon consideration of an official representation or a report from any of their officers or other information in their possession, and the sub-section implies that they must be satisfied that any dwelling-house of a type suitable for occupation by persons of the working classes is in some respects unfit for human habitation. The sub-section goes on to provide that, except in a case where they are satisfied that the house is not capable at a reasonable expense of being rendered fit for human habitation, they shall serve a notice to execute the works specified in the notice and state that, in the opinion of the authority, those works will render the house fit for human habitation.

The four notices in the present case required certain comparatively trivial things to be done, but they also required in reference to external matters that the person on whom they were served should take down and rebuild walls. In one case the provision was to take down and rebuild the front, back main and back addition walls where necessary: in two cases, it was to take down and rebuild the front and back addition walls where necessary, leaving out the words "back main"; and in most of the notices there was a requirement that the remainder of certain walls should be repointed where necessary, or that the front walls should be repointed where necessary. The plaintiff has, as I have said, caused certain work to be done on all the premises: but this, I think, is true, that he has not rebuilt any of the walls, though he has in fact repointed, as I gather, all the walls or a goodly number of them. All the work which he did was done on or before October 14, 1932, and it is contended on his behalf that the notices have been complied with. That is disputed, and the Council's senior sanitary inspector, one Mr. Clinch, complained that the work was not done, and appears to have stated that the Council would enter upon the said houses and rebuild the walls and take off the roofs in order to examine the roof timbers.

The first point taken on behalf of the plaintiff is that s. 17, sub-s. 1, of the Act requires a judicial discretion, or, at any rate, a discretion, to be exercised by the Council: and it is contended further that the Council are not entitled to act slavishly in following the report of an officer or an official representation, but are bound to exercise some discretion with regard to requiring the repair of insanitary houses under the section. For that contention a decision of the House of Lords in *Hall* v. *Manchester Corporation* is relied upon. (1) That case has certainly a superficial resemblance to the one which I have to decide. It arose under s. 41 of the Manchester Corporation Waterworks and Improvement Act, 1867, which enabled the corporation by an order to declare that a house was not fit for human habitation in a case where it had been certified by an inspector of nuisances that the building was unfit for human habitation. By later local Acts a right of appeal to Quarter Sessions was given to any person dissatisfied with any such order. The House of Lords decided that the corporation had a judicial discretion to make an order under the section upon a certificate of the inspector such as I have mentioned, but I think all the learned Lords expressed the opinion that the duty was one which was not imposed on the corporation by the mere ipse dixit of any medical practitioner: in other words, that they were not entitled to rely on the report of an officer, but that they had to exercise a judicial discretion in the matter. On the other hand, these distinctions may be pointed out. In the first place, in *Hall* v. *Manchester Corporation* (1) the section was one which enabled the corporation to condemn the house altogether as unfit for human habitation, being in that respect analogous to s. 19 of the Housing Act, 1930, and not so closely resembling s. 17, where the right of the local authority is to require a certain amount of repair. Further, Lord Dunedin certainly, in *Hall* v. *Manchester Corporation* (1), placed some reliance on the fact that the section, namely, s. 41 of the Manchester Corporation Waterworks and Improvement Act, 1867, was permissive only, using the words "the corporation may by their order, ... declare . . . ." whereas in the present case the section follows the form ". . . . a local authority shall, unless they are satisfied . . . . serve the notice. . . . ."

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(1) 79 J. P. 385; [1915] W. N. 192.

Mr. Montgomery, on behalf of the Council, disputes altogether that *Hall* v. *Manchester Corporation* (1) is applicable to a case arising under s. 17 of the Act, and he also contends that in the case of the Act any difficulty in the matter is removed by s. 22, which provides for an appeal by any person aggrieved by a notice under Part II. of the Act, requiring the execution of works, and further provides by sub-s. 5 that any notice (inter alia) against which an appeal might be brought to a county court shall, if no such appeal is brought, become operative on the expiration of the period of twenty-one days mentioned in sub-s. 1. He contends that, since the notices under the sub-section become final and conclusive as to any matters which could have been raised on such an appeal, it is too late now to question the validity of the notices, inasmuch as there has been no appeal. On the whole I think that contention is a sound one. I think it is open to a person aggrieved to complain of a notice delivered to him under s. 17, sub-s. 1, of the Act, on the ground that the local authority have not performed the duty which, I think, is cast upon them of exercising some discretion in deciding to make an order under the section. The matter therefore does not arise here for decision, but it may be convenient that I should mention, for the benefit of the Council and others in a like position, that, in my opinion, a local authority, though they have to exercise a discretion in the matter in considering whether a notice should be served, ought also to exercise a discretion with regard to the nature of the works which are to be specified in the notice. That, I think, follows from the fact that they have to be satisfied that the house is capable at a reasonable expense of being rendered fit for human habitation. They cannot do that unless they give some consideration to the question of the works to be specified in the notice: and, moreover, the notice itself has to state that, in the opinion of the authority, the work so specified will render the house fit for human habitation. That seems to be rather different from stating that, in the opinion of some officer, who may be quite unknown to any one in the district, the works in question will render the house fit for human habitation. I do not wish to be misunderstood by my use of the word "discretion." I have come to the conclusion that this is not a case, as was *Hall* v. *Manchester Corporation* (1), where the owner of the house or the person in charge of it is entitled to be summoned to attend the local council or committee before the order is made: nor do I consider it necessary for the whole of the Council to consider the matter. It seems to me quite sufficient if some delegate body, whether the Housing Committee or some one entrusted by it on behalf of the Council, looks into the matter and studies the official representation or the official report, or the other information, and the notice which is proposed to be served. Upon that I think the local authority can properly act, but I do express the opinion that something of the sort is necessary.

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(1) 79 J. P. 385; [1915] W. N. 192.

There is another point which arises upon the notice. As I have stated, the notices require walls to be taken down and rebuilt "where necessary." Mr. Montgomery, for the Council, asks me to believe that that is a common form. The plaintiff, on the other hand, has called one witness, an architect of experience, who does not think it is a common form although it may not be very unusual. Mr. Montgomery contends that the form of the notice shows that some part of the walls in question certainly must be taken down and rebuilt. He has

(1) 79 J. P. 385; [1915] W. N. 192.

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to admit that no part is specified. He excuses the form of the notice by stating, as no doubt is true, that it is impossible exactly to state the area of a wall which may have to be taken down, because, as soon as the wall is tampered with to correct the defect, it may well be found that much more of it has to be taken down and rebuilt than was apparent before the work was begun. So far as I can properly express an opinion, I agree with that: I think it is true; but it does not follow that the notice cannot specify with reasonable clearness what portion of the wall it is necessary to begin to deal with for the purpose of putting right the defect. It is possible to specify that it is necessary to rebuild the wall at a particular angle of the building, or the wall above the string course, or the wall from the ground level, or the eastern portion of the building, or the part of the building where there is a bulge in the wall, or that part of the building which is out of the true to a particular extent. All those things can be specified.

The question I have to determine is whether the notices in this form make it absolutely necessary for the person on whom they are served, or other responsible person, to take down some portion of the wall without telling him which portion. To my mind the proper view is that the notices require him to take down and rebuild only such part of the walls, if any, as it is necessary to rebuild. If it were not so it would be a great hardship upon the owner of a building to tell him, at the risk of very serious consequences, to do "something"; and it seems to me that he is entitled to be told what it is that he must do. It seems to me that a notice to rebuild such part of a wall as may be necessary, or to rebuild a wall where necessary, leaves it open to him to say, on examination with the assistance of a builder or an architect, that it is not necessary to take down and rebuild any part of the wall, and that another step will be sufficient.

I may add that, in my opinion, the notices would be wholly bad for want of precision if they were to be construed as notices to take down a part of the wall in any event without specifying what part. It is true that, on the view I have formed, that the point that the notices are bad is not open to the plaintiff, because there was a right of appeal with regard to them which was not exercised, and the notices must now be final and conclusive in regard to such a matter, which could have been raised in the county court. I have had to decide the point because of the next matter which it is necessary to decide. As I have already stated, the plaintiff states that he has complied with the notices, and the Council dispute that assertion. Mr. Montgomery, with his usual candour, has told me that the Council desire to proceed under s. 18, sub-s. 2, by giving notice that they are about to enter upon the dwelling-houses, if they are entitled to do so, for the purpose of doing the necessary work. That renders it necessary for me to decide whether the Council would be entitled to enter if the works specified in the notices had been done, as the plaintiff says they had been.

Perhaps I should mention here that as soon as I saw the report of Mr. Kennard, the architect called by the plaintiff, with regard to the works which were done and the condition of the four houses, I appreciated that it would take some days, possibly a good many days, for me to determine here whether the notices had been complied with or not. On the other hand, my belief is that an expert surveyor or an architect, by going to the buildings with the notices in his hand, assisted it may be by any reports of other architects or surveyors, will have no difficulty in coming to a conclusion on that point. Accordingly, I do not intend to decide here that the notices have been complied with. That, I think, is a matter for reference.

I have, however, to decide whether the plaintiff is entitled to come to the High Court and to establish the fact that the notices have been complied with. The Council contend that he is not so entitled. That means that, according to the Council's view, the plaintiff's right course in this matter is to allow the Council to act on their view that the notices have not been complied with, that is, to enter, pull down, and rebuild these walls, and then to make an order under sub-s. 3 with regard to the expenses incurred, which then may be recovered by action or summarily as a civil debt from the person having control of the houses. In my opinion, although there is, no doubt, after the order for expenses has been made, a right of appeal under s. 22 to the county court, a local authority, according to s. 18, have no power to enter upon the dwelling-house and do the work or to give the special notice specified in s. 18, sub-s. 2, unless the preliminary requisite—namely, the non-compliance with the notice given under s. 17, can be shown to have been fulfilled.

As contended by counsel for the plaintiff, it is a strong thing to allow a private owner's house to be invaded by, possibly, a horde of workmen, when it may be that they have no right whatever to enter upon the premises in question; and, although there is given a right of appeal at some later date if expenses are sought to be levied against the owner, I can find nothing in the Act to justify the view that the Council, whether or not the notices have been complied with, are entitled to enter upon the premises in question and to pull down and rebuild walls or do other works of that character. If the intention of the Legislature had been that this power should be given to local authorities, irrespective of compliance with the notice, the section would have taken a different form, and it seems to me that if it had taken that form, s. 22, which gives a right of appeal, would have given a specific right of appeal to the county court in the event of a local authority wrongfully exercising its right to re-enter upon the premises.

I see no reason for departing in this case from the language of the section, and I think the right to enter is limited to a case where the notice under s. 17 has not been complied with. It is, in my opinion, therefore open to the plaintiff to establish, in such a way as he may deem convenient, that the notice has been complied with, so that the right of the local authority to enter does not any longer exist.

[The case was then adjourned to be referred to a special referee for inquiry and report whether the four notices, specifying them, or some of them, had been complied with.]

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The plaintiff appealed from so much of the order of Maugham J. as declared that the notices in question were valid. The appeal was heard on May 5, 1933.

Lionel Cohen K.C. and *Phineas Quass* for the appellant repeated the arguments used in the Court below against the validity of the notices, and referred to *Hall* v. *Manchester Corporation* (1) and *Fletcher* v. *Ilkeston Corporation.* (2)

R. M. Montgomery K.C. and *Maurice FitzGerald* for the respondents were not called upon to argue.

Lord Hanworth M.R. This appeal fails and must be dismissed. Maugham J. held that the notices issued under s. 17 of the Housing Act, 1930, were valid, and he made an order part of which stands in its terms. It is from that portion of the order which declared that the notices are valid that the appeal is taken. Now the notices that are so referred to are in respect of four houses, purchased by the plaintiff, Nos. 4, 10, 12 and 14 Myra Street, within the borough of West Ham. From the materials before us it appears that a report was made on April 1, 1932, by the medical officer of health under s. 17 of the Housing Act, 1930. In that report he said: "(*d*) Under s. 17 of the Housing Act, 1930, I report the following houses as being, in certain respects, unfit for human habitation and capable at a reasonable expense of being rendered fit." Then follow the numbers of seven houses in Myra Street, West Ham, including the four houses purchased by the plaintiff. Thereupon the respondents' Housing Committee stated that "having considered the representation contained in clause (*d*) with reference to the dwelling-houses referred to therein, they recommend that notices under s. 17 of the Housing Act, 1930, be served upon the landlords, requiring them within reasonable time, not being less than twenty-one days, to execute such works as will render the houses fit for human habitation." Afterwards that came before the Council on

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(1) 79 J. P. 385; [1915] W. N. 192.

(2) (1931) 96 J. P. 7.

April 26, and it was resolved that the report of the Housing Committee be received and adopted and its recommendations be carried into effect. Accordingly, on April 28, notices were served upon the landlords. It is said that those notices were invalid, upon the ground that there is no sufficient proof that the Council had considered what it was necessary for them to consider before the notices had been issued.

The simple point that is before this Court is whether those notices were valid or invalid. We have come to the conclusion that they were valid. Consideration must be given to ss. 17, 18 and 19 of the Housing Act, also to s. 22, which enables an appeal to be made to the county court, but makes it impossible to appeal after the lapse of twenty-one days from the date of the service of the notice. In the present case there was no appeal to the county court within the twenty-one days of the service of the notices, and the result is that they stand good in their terms if they are valid notices under s. 17.

Sect. 17 would appear, at first sight, to be somewhat curiously drawn, because it contains the phrase " unless they " —that is the local authority—" are satisfied that it "—that is the dwelling-house—" is not capable at a reasonable expense of being rendered so fit." That would seem a curious way of introducing a condition, but it must be borne in mind that s. 19 gives power to a local authority to order the demolition of an insanitary house, and " an insanitary house " is such a house as is incapable of being restored as suitable for occupation by persons of the working classes, except at an expenditure which makes it impossible or impracticable to let the house after those repairs on anything like economic terms. That word " unless," that I have referred to, indicates that there are two courses open to the Council, either to serve a notice requiring the repair of an insanitary house, on the basis that the repairs can be carried into effect on an economic basis, or to issue a demolition order under s. 19 where there can be no repair of the house on an economic basis. Now it appears to me that s. 17 is intended to give a local authority wide power to act. It does not require that there shall be a close examination, or, indeed, a hearing, before the initiative is taken by the local authority, and the terms of the section make that plain. It provides: "Where a local authority, upon consideration of an official representation, or a report from any of their officers, or other information in their possession, are satisfied that any dwelling-house . . . . is in any respect unfit for human habitation," but can be repaired within the limits of expense on an economic basis, then they can serve the notice. By sub-s. 4: "Regard shall be had to the estimated cost of the works necessary to render it so fit and the value which it is estimated that the dwelling-house will have when the works are completed." That word "regard" is intended to be a loose and indefinite term, and I think it enables the local authority to take into account not merely an accurate estimate made by a surveyor or an estate agent with a schedule of dilapidations, but to take into account what would probably be the cost of the outlay required, and to consider whether, after that outlay had been incurred, it would be possible to let the house and get a return for the total expenditure upon the premises. I am, therefore, of opinion that what has been done here is abundantly sufficient to justify the notices being served under s. 17, and not under s. 19, which is to apply where it is not possible to repair the house within the limits that I have specified.

Then comes s. 18, which provides that if a notice has been served under s. 17, "then, after the expiration of the time specified in the notice or, if an appeal has been made against the notice and upon that appeal the notice has been confirmed," the local authority may themselves do the work. That clearly indicates, or it contemplates, that there may be an appeal after the notice has been served under s. 17; and that is explicitly confirmed under s. 22, where a person who is aggrieved by "a notice under this Part of this Act requiring the execution of works" is empowered within twenty-one days after the service of the notice to appeal to the county court within whose jurisdiction the premises to which the notice or order relates are situate, and to carry the question whether or not the repairs are required or ought to be effected, or can be economically carried out, before the county court. That being so, the notice that is indicated by s. 17 is one that can be questioned under the system laid down. The notice is the commencement of the proceedings which are to lead to repairing insanitary houses, and sufficient right is given to persons who are required to do that work to put their case before the appropriate authority. In the present case there was no appeal. The notices were issued and served; they were served after there had been information in the possession of the Council. There is no indication that the Council did not give proper regard to the cost of the works necessary, and it appears to me that upon the point which is now appealed to the Court, Maugham J. was right and the appeal must be dismissed with costs.

LAWRENCE L.J. I agree, and will only add a few words. In my judgment, the learned judge was right in holding that the notices served by the Council were notices given pursuant to s. 17 of the Act of 1930, and therefore came within the purview of ss. 18 and 22 of the Act, with the result that not having been appealed against they are valid notices, whether or not the Council complied strictly with requirements of sub-s. 4 of s. 17. But speaking for myself, and assuming that under sub-s. 4 a duty was cast upon the Council to estimate the cost of the works necessary to render the dwelling-house fit for human habitation and the value which that dwelling-house would have after the works were completed, I decline in the absence of evidence to the contrary to hold that the Council did not discharge its duty in that respect. As my Lord has pointed out, the phrase that "regard shall be had" to the estimated cost and the estimated value of the property, does not imply that the Council is bound to have a certificate from a surveyor and valuer before it can come to the requisite conclusion. In a populous district like the one now under consideration, matters relating to insanitary dwellings must crop up very frequently, and I

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decline to assume that the ladies and gentlemen who compose the Council would not discharge their duty and would cause notices to be served under s. 17 without satisfying themselves as to the estimated amount of the cost of the necessary repairs and as to the estimated value of the property after the work has been completed. It is obvious that before deciding to serve the notices they must take these matters into consideration, as it would be their duty, if they were satisfied that the work could not be carried out at a reasonable expense, to make a demolition order under s. 19. Be that as it may, however, even if the Council has in some way neglected its duty in the present case, I am clearly of opinion that the notices were given by the Council under s. 17, and, therefore, if the owner desired to dispute the notices on the ground that they were improperly given, his proper course was to appeal against them under s. 22.

Romer L.J. I agree that this appeal fails. It was admitted by Mr. Cohen that it necessarily does so fail unless he can satisfy us that the notices served on his client on April 28, 1932, were not notices "under this Part of this Act requiring the execution of works" within the meaning of s. 22, sub-s. 1 (*a*), of the Housing Act, 1930. It was argued on behalf of the appellant that the notices were not notices within that sub-section, because, it is alleged, the Housing Committee of the Council merely acted upon a report of the medical officer of health and did not themselves consider the question at all, either as to whether the houses were unfit for human habitation or whether they could be rendered fit for human habitation by the expenditure of a reasonable sum, that is to say, "at a reasonable expense." Now, the report of the medical officer was that certain houses, which included the houses in question in this action, were in certain respects unfit for human habitation and were capable at a reasonable expense of being rendered fit. It appears from the minutes of the meeting of the Housing Committee at which it was recommended that notices under s. 17 should be served in respect of these houses, that the representations contained in that report were considered. By the word "considered," I understand that the Housing Committee considered whether the representations were well founded or not. So that, there being no evidence to the contrary, I assume that the Housing Committee did the duty which was imposed upon them by the Act and themselves formed an opinion upon both the points that had been referred to.

For these reasons, it appears to me that this appeal fails, and I do not myself find it necessary in the circumstances to express any view upon the question of whether, supposing the Housing Committee had failed in their duty of considering these questions, the notices would have ceased to be notices under s. 22, sub-s. 1.

Appeal dismissed.

Solicitors for appellant: *Davies, Arnold & Co.*

Solicitor for respondents: *G. F. Thompson, Town Hall, West Ham.*

W. I. C.

In re BARON WAVERTREE OF DELAMERE (DECEASED).

RUTHERFORD *v.* HALL-WALKER.

EVE J.
1933
June 15, 22.

[1933. W. 1171.]

Will—Bequest of "such of the furniture and household effects in or about either of my residences A or B as she may select"—Legatee entitled to all the Furniture and Household Effects in both Houses.

A testator bequeathed to his adopted daughter Rosemary "such of the furniture and household effects which at the date of my death shall be in or about either of my residences Horsley Hall or Sussex Lodge as she may select for the purpose of furnishing a residence for my said adopted daughter":—

Held, (1.) that the legatee was entitled to select from both of the houses; (2.) that "household effects" included motor-cars, consumable stores, garden implements and tools and movable plants; (3.) that there was no quantitative limit to the power of selection, but that the legatee was entitled to the whole of the furniture and household effects in the two houses.

Arthur v. *Mackinnon* (1879) 11 Ch. D. 385 followed.

ADJOURNED SUMMONS.

The Right Honourable William Hall Baron Wavertree of Delamere made his will dated June 30, 1932. By clause 1 he appointed Sir John Hugo Rutherford, Edward William Crawford, and Robert Neilson to be executors and trustees thereof, and after specifically devising certain real estate he directed that the trust funds subject to the trusts of his marriage settlement should after the death of his wife Lady Wavertree be held upon trust to pay the income thereof to Richard Brinsley Sheridan during his life, and after his death upon trust, as to both capital and interest, for the eldest or only male descendant of the said Richard Brinsley Sheridan living at his death who should have attained or should attain the age of twenty-one years, but if he should not leave such a male descendant upon trust to pay the income thereof to Brian Hervey Talbot during his life upon trust, as to both capital and income, for the eldest or only male descendant of Brian Hervey Talbot who should have attained or should attain the age of twenty-one years, and if both Richard Brinsley Sheridan and

Brian Hervey Talbot should die without leaving any such male descendant them respectively surviving the testator directed that the said trust funds should be held by his trustees upon trust to pay the income thereof to the Blue Coat Hospital at Liverpool to be applied as part of the income of the endowment fund of the said hospital with certain provisions as to the capital of the said trust fund.

By clause 12 the testator bequeathed to his trustees 10,000 5*l.* per cent. cumulative preference shares of 10*l.* each in the capital of Peter Walker & Son, Warrington, and Burton, Ld., upon trust to pay the income thereof to his adopted daughter Rosemary Cicely Carlfried Hall-Walker without power of anticipation with certain trusts over after her death.

Clause 14 of the will was in the following terms: "I bequeath to my said adopted daughter Rosemary such of the furniture and household effects which at the date of my death shall be in or about either of my residences Horsley Hall or Sussex Lodge as she may select for the purpose of furnishing a residence for my said adopted daughter."

By clause 21 the testator bequeathed all his residuary real and personal estate unto his trustees upon trust for sale and conversion and after payment thereout of his funeral and testamentary expenses and debts and the legacies bequeathed by his will and the duties thereby made payable out of his residuary estate, upon trust for investment as therein directed and to stand possessed thereof and the investments representing the same (thereinafter referred to as "the residuary trust fund") upon the trusts thereinafter declared.

By clause 22 the testator authorized his trustees out of the residuary trust fund to purchase a house at such cost as they should in their absolute discretion think fit not exceeding 5000*l.* as a residence for the said Rosemary Cicely Carlfried Hall-Walker.

By clause 24 the testator directed that his trustees should accumulate the income of the residuary trust fund for twenty-one years after his death, and should stand possessed of the residuary trust fund and the accumulations thereof upon trust to pay the income thereof to Brian Hervey Talbot if he should be living at the expiration of the twenty-one years, and after his death upon trust as to both capital and income for the eldest or only male descendant of Brian Hervey Talbot living at the expiration of the said period or at the death of Brian Hervey Talbot whichever was the later date who should have attained or should attain the age of twenty-one years absolutely, but, if there should be no such male descendant who should attain an absolute interest therein, then upon the same trusts as were declared by clause 11 of and concerning the marriage settlement funds in the event of there being no male descendant of Richard Brinsley Sheridan or Brian Hervey Talbot who should become absolutely entitled thereto.

The testator made two codicils to his said will which are not material to this report, and died on February 2, 1933, and his said will with the said two codicils thereto was duly proved in the Principal Probate Registry on March 3, 1933.

Richard Brinsley Sheridan mentioned in clause 11 of the will died in the testator's lifetime without leaving male descendant. Brian Hervey Talbot was an infant and unmarried at the testator's death.

At the testator's death both the houses Horsley Hall and Sussex Lodge mentioned in clause 14 of the will were fully furnished and equipped, and each of them contained certain consumable stores. The motor-house attached to each of the said houses contained one or more motor-cars, and in the outbuildings and gardens of each of the houses there were a number of garden tools and implements and movable plants. No house had yet been purchased by the trustees under clause 22. Questions arose in the administration of the testator's estate as to the rights of Rosemary Cicely Carlfried Hall-Walker under clause 14 of the will in the contents of the houses Horsley Hall and Sussex Lodge, and the trustees issued this summons on April 3, 1933, to which Rosemary Cicely Carlfried Hall-Walker, Brian Hervey

Talbot, and the Governors and Trustees of the Liverpool Blue Coat Hospital (as the ultimate residuary legatees) were defendants. The questions asked were :—

1. Whether upon the true construction of the testator's will the defendant Rosemary Cicely Carlfried Hall-Walker is entitled under the bequest in clause 14 of the will to select furniture and household effects from both the testator's residences Horsley Hall and Sussex Lodge or whether she must elect from which of the said houses she will select articles of the specified nature, and is precluded from selecting any articles from the other of the said houses.

2. Whether the words " furniture and household effects " in the said clause include any and which of the following classes of articles : (*a*) motor-cars ; (*b*) consumable stores ; (*c*) garden implements and tools ; and (*d*) movable plants.

3. Whether there is any and if so what quantitative limit to the power of selection.

E. J. Heckscher for the trustees.

Fergus Morton K.C. and *L. F. Potts* for Miss Hall-Walker. It is absurd to say that our client's field of selection is limited to the contents of one house only. It is free from doubt that she can take from both houses, and that she is entitled to take the whole of the furniture in both houses if she thinks fit : *Arthur* v. *Mackinnon.* (1) The words " household effects " are very wide and include everything in or about either of the houses, such as consumable stores, motor-cars, implements and tools used in the gardens and movable plants.

Cyril Radcliffe for Brian Hervey Talbot. The words of the gift are clearly alternative, and when the will speaks of " either of my houses " that clearly negatives the right to take from more than one of the houses. Clauses 14 and 22 must be read together and Miss Hall-Walker can only take such furniture and household effects as she can use in one house when purchased for her.

Hugh Gamon for the Blue Coat Hospital adopted the arguments of Mr. Radcliffe.

Cur. adv. vult.

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(1) 11 Ch. D. 385.

June 22. EVE J. These proceedings have been instituted to determine the true construction of clause 14 of the testator's will. It is in these terms: "I bequeath to my said adopted daughter Rosemary such of the furniture and household effects which at the date of my death shall be in or about either of my residences Horsley Hall or Sussex Lodge as she may select for the purpose of furnishing a residence for my said adopted daughter," and the questions submitted for my judgment are: (1.) Is the legatee entitled to select furniture and household effects from both of the residences mentioned, or must she elect from which of them she will make her choice, and thereupon be precluded from making any selection from the other? (2.) Does the bequest include motor-cars, consumable stores, garden implements and tools and movable plants? (3.) Is there any and if so what quantitative limit to the power of selection?

I think that the questions should be answered as follows: (1.) That the legatee is entitled to select from each of the two houses. The subject-matter of the gift comprises chattels in or about two residences, and the clause will not, in my opinion, bend to a construction which will make the word "either" equivalent to the phrase "one or other." (2.) The phrase "in or about" includes the motor-cars and the other three items enumerated in this question. (3.) There is no quantitative limit to the power of selection. The phrase "for the purpose of furnishing a residence," whether it be explanatory of the motive underlying the bequest, or a reminder of the purpose for which the bequest is made, cannot operate to cut down the bequest. Moreover, it gives no indication of the sort of size of the house which is contemplated and only raises an uncertainty. Nor does the fact that the power of selection is from two houses of furniture for one house lead to the conclusion, either that the right to select is limited to one house, or that the power to select is to extend only to part of the chattels. Still less can the construction of this bequest be controlled by any reference to clause 22 of the will, whereby the trustees are authorized to expend a sum not exceeding 5000*l.* in the purchase of a house for the legatee. In my opinion this part of the case is concluded by the authority of *Arthur* v. *Mackinnon* (1), approved and followed by the Court of Appeal in *In re Sharland.* (2) The legatee, in my opinion, is absolutely entitled to the whole of the furniture and effects in both houses.

Solicitors: *Mayo, Elder & Rutherfords; Roche, Son & Neale; Whitfield, Byrne & Dean, for Whitley & Co., Liverpool.*

E. K. C.

EVE J.
1933
June 16, 20.

In re JONES.

JONES *v.* JONES.

[1933. J. 357.]

Will—Construction—Annuity—Income Tax—" Such an annuity as after deducting income tax at the current rate therefrom will amount to the clear yearly sum of 350l. "—Allowances and Reliefs—Repayment of Tax overpaid—Annuitant entitled to Moneys repaid.

A testatrix by her will directed her trustees to pay to or apply for the benefit of her daughter M. L. J. such an annuity as after deducting income tax therefrom at the current rate for the time being would amount to the clear yearly sum of 350*l.*

In December, 1932, the Inland Revenue Commissioners paid to a receiver appointed by the Court of the income of M. L. J. the sum of 131*l.* 12*s.* 7*d.*, being allowances and reliefs in respect of income tax upon the annuitant's income for the three preceding financial years:—

Held, that so much of that sum as was attributable to tax upon the annuity in question belonged to the annuitant and not to the residuary estate of the testatrix.

Income tax " at the current rate " means tax at the standard rate, irrespective of reliefs and abatements.

In re Pettit [1922] 2 Ch. 765 distinguished.

ORIGINATING SUMMONS.

Under the will of Martha Lloyd Jones, who died on January 1, 1930, the plaintiffs as trustees thereof were directed to pay or apply for the benefit of the daughter of the testatrix,

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(1) 11 Ch. D. 385.

(2) [1896] W. N. 662; 74 L. T. 664.

EVE J.
1933
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Mabel Lloyd Jones, such an annuity as after deducting therefrom income tax at the current rate for the time being would amount to the clear yearly sum of 350*l.* free of duty, and also to Emily Yonge Morrish such an annuity as after deducting therefrom income tax at the current rate for the time being would amount to the clear yearly sum of 60*l.*, to be applied by her towards the cost of dress and clothing for the said Mabel Lloyd Jones during her lifetime, any surplus income in the hands of the trustees to be paid to the respondent Hubert Lloyd Jones.

The summons was taken out by the plaintiffs to determine whether certain moneys in hand representing repayments by the Inland Revenue in respect of allowances and reliefs of tax on the said annuities belonged to the annuitant or to the residuary estate of the testatrix.

J. H. Stamp for the annuitant. The statutory conditions are material in considering the effect of the will in the present case: see the Income Tax Act, 1918, ss. 27, 28 and 29, and r. 19 of the General Rules to All Schedules. The current reliefs were established by the Income Tax Act, 1920, ss. 17 to 23 inclusive.

The annuitant is entitled to any relief she may recover. What is given is an annuity calculated, having regard to income tax at the current rate thereon, to yield the clear yearly sum of 350*l.* The question, therefore, is what income tax at the current rate must be added to 350*l.* in order to ascertain the amount of the annuity payable. One-third of 350*l.* must be added, that is, 116*l.* 13*s.* 4*d.*, making the total to which the annuitant is entitled 466*l.* 13*s.* 4*d.* The same process, applied to the annuity of 60*l.* clear, makes it 80*l.*

There is a compulsory clause in the Rules prohibiting the payment of an annuity free of tax under a deed of agreement, but that does not apply to an annuity under a will.

In *In re Pettit* (1) the annuity was given "free of income tax," the trustees paid the tax and the annuitant was not concerned with the tax at all. But that does not apply to the present case. The whole process is one of ascertaining the amount of an annuity which, after deduction of income tax, whether paid by the trustees or the annuitant, therefrom, leaves 350*l.*, and the answer is that the annuity payable is 466*l.* 13*s.* 4*d.* Income tax "at the current rate" means at the standard rate, which is now 5*s.* in the pound, but may vary from year to year. That rate has nothing to do with the reliefs and abatements which the annuitant may recover from the Inland Revenue, it may be, twelve months after she has received the annuity. There is no accountability for personal allowances. There are a very large number of annuities payable in accordance with a similar formula to the present; for instance, annuities paid by order to divorced wives: and see *In re Bates.* (1)

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(1) [1922] 2 Ch. 765.

Wilfrid Hunt for the residuary legatee. For the purposes of the decision in *In re Pettit* (2) it makes no difference what is the form under which the annuity is given. An annuity of 75*l.* a year free of income tax is in substance the same thing as an annuity of 100*l.* a year less income tax, and therefore the decision in *In re Pettit* (2) applies, and whatever the annuitant recovers must be recouped to the estate.

The testatrix has asked herself the question: how much does the annuitant require to live upon? and answered it by saying the amount is 350*l.* clear of all income tax, and neither more nor less, except that there was to be an extra 60*l.* paid to Emily Yonge Morrish, the annuitant's companion, to be applied by her for dress and clothing for the annuitant. Any surplus income in the hands of the trustees is to be paid to the respondent Hubert Lloyd Jones. The effect of the Income Tax Acts cannot alter the intention of the testatrix, as expressed in her will, and make the annuity larger than she intended.

Stamp in reply. There is no direction in the will for deduction of the tax at the current rate. The difference in form between this annuity and an annuity given "free of tax" is a real difference in substance.

Cur. adv. vult.

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(1) [1925] Ch. 157.

(2) [1922] 2 Ch. 765.

June 20. EVE J. The applicants are the executors and trustees of the late Martha Lloyd Jones who died on January 1, 1930, having by her will dated March 12, 1929, devised and bequeathed to them her residuary trust funds in trust to pay thereout to her daughter, the respondent Mabel Lloyd Jones, or apply for her benefit or requirements such an annuity as after deducting therefrom income tax thereon after the current rate for the time being would amount to the clear yearly sum of 350*l.* free of duty, and to Emily Yonge Morrish such an annuity as after deducting therefrom income tax thereon after the current rate for the time being would amount to the clear yearly sum of 60*l.* free of duty to be applied by her as and when required for and towards the costs and expenses of dress and clothing for her said daughter during her lifetime. And the testatrix declared that should there be at any time any surplus income in the hands of her trustees they should pay the same and the accumulations thereof to her son, the respondent Hubert Lloyd Jones, once in every two years.

On March 25, 1931, a receiver was appointed, under s. 116 of 53 Vict. c. 5, of the dividends, interest and income and all arrears thereof to which the said Mabel Lloyd Jones was or might become entitled, and on December 8, 1932, the Commissioners of Inland Revenue paid to the receiver 131*l.* 12*s.* 7*d.* by way of repayment of income tax for the three years to April 5, 1932, in respect of the income of the said Mabel Lloyd Jones to that date. Her total gross income for that period amounted to 1219*l.* 12*s.*, of which the sum of 1027*l.* 13*s.* 1*d.* consisted of the annuity of 350*l.* and 176*l.* 3*s.* 5*d.* of the annuity of 60*l.*

The question has now been raised whether the 131*l.* 12*s.* 7*d.* is payable to the annuitant, or whether so much of the amount as is attributable to the annuities ought to be treated as part of the residuary estate of the testatrix. The testatrix, be it observed, has not bequeathed the annuities free of income tax. Had she so done the case would have been covered by the decision in *In re Pettit* (1), and the residuary estate

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(1) [1922] 2 Ch. 765.

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would have been entitled to so much of the amount repaid as represents repayment in respect of the tax payable on the annuities. What she has done is to provide that the beneficiary shall in every year be paid two sums of such amounts as shall, after deduction of the income tax for the time being payable in respect thereof, leave 350*l.* and 60*l.* The income tax only comes in for the purpose of fixing in each year the amount to be provided.

I think in this connection the current rate means the standard rate, not the rate at which the annuitant may ultimately have to pay, and in each of the two cases the bequest is of an annual sum liable to fluctuation in accordance with the movement up or down of the standard rate. It is not an annuity bequeathed free of tax. On the contrary, the trustees will by deduction from the sum set aside each year pay on behalf of the annuitant the tax payable in respect thereof, and if the annuitant succeeds in recovering any part of the tax paid it will belong to her just as it would do in the case of an annuity not bequeathed free of tax. I think therefore the question raised by the summons ought to be answered in favour of the annuitant, and the costs must be taxed and paid out of the residuary estate.

Solicitors for all parties: *Close & Co.*

H. L. L.

CLAUSON J.

1933
May 9.

In re SMITH.

BULL *v.* SMITH.

[1930. S. 5155.]

Will—Construction—Devise of Copyholds—Ultimate Limitation in Trust for " my own Right Heirs (other than and except my Nephew Robert John Smith and his Issue)"—Ineffective Limitation.

A testatrix by her will dated March 31, 1873, in exercise of a general testamentary power of appointment, devised her copyhold lands upon trusts in favour of certain relatives and their respective issue in tail—all which trusts determined by their deaths without issue—with an ultimate trust for " my own right heirs (other than and except my nephew Robert John Smith and his issue)."

On October 2, 1875, by an award of the Copyhold Commissioners, the copyhold lands so devised were enfranchised.

Robert John Smith, who would have been the testatrix's heir at common law had he survived her, died on May 12, 1879.

The testatrix died on September 11, 1883, leaving John Robert Smith, the eldest son of the said Robert John Smith, her heir at common law, a nephew Alfred William Smith, her heir at common law if Robert John Smith and his issue were excluded, and a brother George Smith, her heir according to the custom of the manor, which was borough-English:—

Held, that the words " my own right heirs " must be construed to mean her heirs at common law and not her customary heirs: see *Garland* v. *Beverley* (1878) 9 Ch. D. 213, and that the limitation, not materially differing from the limitation in *Goodtitle* d. *Bailey* v. *Pugh* (1787) 3 Bro. P. C. 454, a decision of the House of Lords, was ineffectual, and accordingly the lands so devised were unappointed.

ADJOURNED SUMMONS.

By a settlement dated August 1, 1871, certain copyhold messuages and hereditaments were covenanted to be surrendered into the hands of the Lord of the Manor of Hova Villa et Hova Ecclesia situate in the parish of Hove in the county of Sussex to the use of Just H. M. Alt his heirs and assigns according to the custom of the said manor upon trust for Charlotte Maria Smith during her life and after her decease upon trust for her children as therein mentioned and in case the said Charlotte Maria Smith should not have any child upon trust for such person or persons and generally in such manner as the said Charlotte Maria Smith should by will appoint or devise the same and in default of any such appointment or devise or so far as any such appointment or devise should not extend or take effect the trustees should stand seised or otherwise entitled to the said hereditaments upon trust for Charlotte Maria Smith her heirs and assigns.

Charlotte Maria Smith, by her will dated March 31, 1873, devised all her copyhold messuages, Nos. 8 and 9 Medina Villas, Hove, and all other the freehold and copyhold messuages and hereditaments in the county of Sussex, if any, or over which she should have any power of disposition at the time of her death, to the use of trustees their heirs and assigns upon trust for her nephew, Alfred Frederick Smith, and her nieces, Fanny Maria Smith and Mary Ann Louise Smith, and their respective issue in tail—all which trusts determined by their deaths without issue—with an ultimate limitation in trust for " my own right heirs (other than and except my nephew Robert John Smith and his issue)." And the testatrix devised, bequeathed and appointed all the rest and remainder of her estate and effects to the use of her trustees, their heirs, executors, administrators and assigns according to the respective natures thereof upon trust to sell the same and to stand possessed of her residuary estate upon trusts which upon the deaths of the respective tenants for life without issue determined.

On October 2, 1875, Just H. M. Alt was admitted tenant upon the Court Rolls of the said Manor ; and on the same day, by an award under the hands and seals of the Copyhold Commissioners, the devised lands were enfranchised from all rights reserved by s. 48 of the Copyhold Act, 1852, to be holden as freehold discharged from all incidents of copyhold or customary tenure.

The testatrix died on September 11, 1883, without ever having been married, and upon the death in 1929 of the last survivor of the testatrix's nephew and nieces, Alfred Frederick Smith, Fanny Maria Smith and Mary Ann Louise Smith, none of whom had issue, the said ultimate limitation of the devised copyhold hereditaments came into operation.

In answer to inquiries directed by an order dated April 17, 1931, made in an action for the administration of the estate of the testatrix, the Master by his certificate dated April 5, 1933, certified (amongst other things) that the heir of the testatrix at common law was John Robert Smith, who was the eldest son of the testatrix's nephew Robert John Smith, who predeceased her ; it was also certified that on the basis of excluding Robert John Smith and his issue, the next nephew of the testatrix in order of seniority was Alfred William Smith (the eldest brother of Robert John Smith), who died on January 5, 1907, and whose personal representative was the defendant Emma Quarm, and further that, according to the custom of the Manor of Hova Villa et Hova Ecclesia, which was borough-English, the heir of the testatrix was the youngest brother of the testatrix, who survived her—namely, George Smith, who died on August 4, 1890, and whose personal representative was the defendant Georgiana Louisa Smith.

The present trustees of the will (who were so appointed on March 4, 1907, and appointed trustees thereof for the purposes of the Settled Land Acts, 1882 to 1890, on October 30, 1920) took out this summons to have it determined what upon the true construction of the will and in the events which had happened was the meaning of the limitation in trust for "my own right heirs (other than and except my nephew Robert John Smith and his issue)," and, in particular, whether (1.) John Robert Smith was entitled to the lands devised by the will of the testatrix, or (2.) Emma Quarm, as the personal representative of Alfred William Smith, the next younger brother of Robert John Smith, was so entitled, or (3.) Georgiana Louisa Smith, as the personal representative of George Smith, the heir of the testatrix according to the custom of the said manor, was so entitled ; and, in case the trust contained in the settlement of August 1, 1871, in default of appointment by the testatrix should be held to have taken effect, what other person or persons were entitled to the said lands.

Since the last appointment of the plaintiffs in 1920, portions of the devised lands were sold and the proceeds of sale invested in their names.

CLAUSON J.

1933

SMITH, *In re.* BULL *v.* SMITH.

R. R. Formoy for the plaintiffs.

J. W. M. Holmes for John Robert Smith. There is no real distinction to be drawn between the language used in the limitation in the will of this testatrix and that used in the limitation in *Goodtitle* d. *Bailey* v. *Pugh* (1), where the limitation was to "the right heirs of me, the testator, for ever, my son excepted, it being my will he shall have no portion in my estates either real or personal. The testator in that case left one son and three daughters. The House of Lords reversed the decision of the Court of King's Bench, and held that no person took any estate under the will by way of devise or purchase. In *Cholmondeley* v. *Clinton* (2) the last case was referred to in the judgment of Grant M.R., and the decision of the House of Lords in that case was accepted by him. He said that the limitation in that case was in effect to the testator's right heir, his right heir excepted, language which involved repugnant and inconsistent expressions; and the decision imported that if there was a person who properly answered the description of right heir, those words could not be designatio of any other person, although the intent not to apply them to the real heir was perfectly manifest. Through the language used in this will the testatrix has failed to appoint the property to anybody else except John Robert Smith (the eldest son of her nephew Robert John Smith), who in the same sentence is excluded from taking it. In *Lightfoot* v. *Maybery* (3) it was observed that it resulted from the decisions in *Goodtitle* d. *Bailey* v. *Pugh* (1) and other cases that effect must be given to a term of art, unless a contrary intention is shown by the context with judicial certainty. The result which follows, if this limitation is held to have no effect, is that the power of appointment conferred by the settlement was not effectively exercised and the lands, or so much of them as remains unsold, together with the investments representing the proceeds of sale of such parts as were sold, passed as in default of appointment under the limitation in the settlement to the testatrix absolutely; and as the trusts upon which the testatrix's residuary estate was devised and bequeathed failed, the testatrix died intestate as to those lands and investments which passed, after all, to John Robert Smith as her heir at law.

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(1) 3 Bro. P. C. 454.

(2) (1817) 2 Mer. 171, 348.

(3) [1914] A. C. 782, 787.

R. J. T. Gibson for the defendant Emma Quarm. The testatrix showed plainly by the language she used her intention that the person to take was the person next entitled as her heir in line of descent after her nephew Robert John Smith and his issue. The late Mr. Jarman criticized the decision in *Goodtitle* d. *Bailey* v. *Pugh* (1) in his work on Wills, 7th ed., p. 1539: he stated that in his view the soundness of that decision was open to question, as the will contained not merely words of exclusion in reference to the son, but "a positive and express disposition in favour of the person who would be next in the line of descent, if the son were out of the way."

H. V. Casson (with him *L. M. Jopling*) for the defendant Georgiana Louisa Smith. I adopt the last argument, at any rate to the extent that the limitation in question is not ineffectual. Some effect must be given to it, but in face of the decision of Fry J. in *Garland* v. *Beverley* (2), which has never been questioned, it is difficult to contend that a gift by the testatrix to her own right heir, taking by way of purchase, is a gift to her customary heir and not her heir at common law.

R. M. Pattisson for the defendant Brightman, the personal representative of Mary Ann Louise Smith deceased, the last surviving tenant for life of the testatrix's residuary estate, upon whose death without issue the trusts thereof came to an end and in whom the legal estate in the lands was vested.

Meyrick Beebee for some of the testatrix's next of kin.

CLAUSON J. Mrs. Charlotte Maria Smith, having a power of appointment over copyhold lands, exercised that power by devising those lands by her will to trustees in trust for various persons with an ultimate trust for "my own right heirs (other than and except my nephew Robert John Smith and his issue)." Having regard to the tenure of the lands so devised, which at the date when the testatrix made her will was copyhold, descendible according to the custom of borough-English, I pause here to consider what is the meaning of the expression in this will of "my own right heirs." Do the words mean her heirs according to the custom ✓ of the manor or her heir at common law ?✓ The answer to that question is to be found in a decision of Fry J. in *Garland* v. *Beverley* (1), that under a devise of customary land, gavelkind land, or borough-English land to the testator's right heirs, his heir at common law is entitled.✓

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(1) 3 Bro. P. C. 454.

(2) (1878) 9 Ch. D. 213, 220.

But then the trust continues with these additional words: "other than and except my nephew Robert John Smith and his issue." Now, had Robert John Smith not predeceased the testatrix, he would have been her heir at law; but as he in fact predeceased her, her heir at law was the eldest son of Robert John Smith—namely, the defendant ✓John Robert Smith. If I were at liberty to construe the words of the limitation in question without reference to decided cases, I should be tempted to decide that the effect of the words was to give the lands to such person as would be the testatrix's heir at law if Robert John Smith and his issue had been wiped out of the family pedigree. But I am precluded from so deciding by the decision of the House of Lords in the year 1787, in *Goodtitle* d. *Bailey* v. *Pugh.* (2) In that case the devise was to "the right heirs of me, the testator, for ever, my son excepted, it being my will he shall have no part in my estates either real or personal." The testator left one son and three daughters. In an action of ejectment in the Court of King's Bench, the daughters contended that they must be the personae designatae, because ✓the son who was the proper heir was plainly and manifestly excluded, not only by the intention but by the express words; and that Court decided that, upon the proper construction of the words used, the devise was to the persons

(1) 9 Ch. D. 213, 220

(2) 3 Bro. P. C. 454.

who would be the testator's right heirs, if his son were excluded from the pedigree. But there was a possible alternative construction, namely, that the devise was to the son—who was in fact the testator's heir at law—followed by words which took the property away from him, with the result that no person took the property under the devise and that accordingly no effect whatever could be given to it. And that was the construction which the House of Lords put upon the words when the case came before it upon a writ of error, and the House so decided. There is no reported case in which that decision has been questioned. The case was referred to in *Cholmondeley* v. *Clinton* (1) and the decision accepted by Grant M.R., and it was cited in *Lightfoot* v. *Maybery* (2) and no doubts were cast upon it. True, it is cited in Jarman on Wills, 7th ed., at p. 1539, with the following comment: "This is an extraordinary decision; and high as is the authority of the Court by which it was ultimately decided, its soundness may be questioned, as the will contains not merely words of exclusion in reference to the son (which, it is admitted, would not alone amount to a devise), but a positive and express disposition in favour of the person who would be next in the line of descent, if the son were out of the way. In this case, we trace but very faintly the anxiety, generally imputed to judicial expositors of wills, ut res magis valeat quam pereat." With great respect for that learned author, I confess I find it difficult to understand what he meant by saying that the will contained a "positive and express" disposition in favour of the person who would be the next heir, if the son were out of the way.

I thought I might be able to find some sufficiently material distinction between the words used by this testatrix and the words in *Goodtitle* d. *Bailey* v. *Pugh* (3), but I can find none. Therefore I feel compelled to follow the decision of the House of Lords in that case, and hold that (having regard to the fact that the testatrix's right heir in whose favour the devise

(1) 2 Mer. 171, 348.
(2) [1914] A. C. 782, 787.
(3) 3 Bro. P. C. 454.

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was made was the eldest son of Robert John Smith, who and whose issue she in the same sentence excluded) the devise must be treated as having no effect whatever.✓

Accordingly, the lands over which the testatrix had the power of appointment (including the investments representing the proceeds of sale of such of the lands as have been sold) being unappointed, passed, in default of appointment, under the trusts of the settlement to the testatrix absolutely and, being (in the events which happened) undisposed of by the devise and bequest of the testatrix's residuary estate, passed to her heir at law, who is the defendant John Robert Smith.

Solicitors : *Pothecary & Barratt ; C. W. Letts, for Wilkins & Son, Aylesbury ; King, Wigg & Brightman ; Bull & Bull.*

H. C. H.

PERFORMING RIGHT SOCIETY, LIMITED *v.* HAWTHORNS HOTEL (BOURNEMOUTH), LIMITED.

BENNETT J.
1933
June 23, 27.

[1932. P. 3108.]

Copyright—Infringement—Musical composition—Performance at a residential hotel—"In public"—Copyright Act, 1911 (1 *&* 2 *Geo.* 5, *c.* 46), *s.* 1, *sub-s.* 2.

An orchestral trio employed at an unlicensed residential hotel played in the lounge of the hotel on a certain evening after dinner. The audience included some of the resident guests and two persons who had dined there, after giving notice of their wish to do so, and who afterwards were in the lounge for the purpose of listening to the music:—

Held, that the performance was a performance "in public" within the meaning of s. 1, sub-s. 2, of the Copyright Act, 1911.

WITNESS ACTION.

The plaintiffs in this action were, on November 20, 1932, the owners of the sole right to perform in public two musical works, named respectively "Bird Songs at Eventide" and "In a Monastery Garden." On November 20, 1932, the defendants, Hawthorns Hotel (Bournemouth), Ld., caused these two musical works to be performed in the course of a programme by an orchestral trio in the lounge of the hotel. The hotel was a high-class unlicensed residential hotel, and the audience consisted of a number of resident guests and an official of the plaintiff society, who, after giving notice of his wish to dine at the hotel, accompanied by a friend, had dined there and had afterwards gone into the lounge with his friend and listened to the music.

The plaintiffs commenced this action against the defendants for an injunction restraining them from performing the two musical works in question.

Hon. S. O. Henn Collins K.C. and *K. E. Shelley* for the plaintiffs. The only question is whether or not the performance by the defendants was a performance in public within the words of s. 1, sub-s. 2, of the Copyright Act, 1911. One material consideration is whether the performance was for profit. The antithesis is a private and domestic performance, and where there is a commercial element the performance cannot be a private performance. Here undoubtedly the commercial element is present. People do not cease to be members of the public because they happen to be visitors at a hotel. Any one who takes a room at the hotel, or has dinner there, can listen to this music. The music is included in the price of the dinner.

[They referred to *Duck* v. *Bates* (1) and *Harms* (*Incorporated*), *Ld., and Chappell & Co.* v. *Martans Club, Ld.* (2)]

W. P. Spens K.C. and *R. C. Vaughan* for the defendants. This is not a public performance. The test is laid down in *Duck* v. *Bates*. (1) The performance was of a domestic or quasi-domestic nature. The two persons who attended it, other than the hotel guests, were not genuine members of the public but were there to watch the interests of the plaintiffs. In any action for breach of copyright it is necessary to show that the owner of the copyright has suffered injury.

Henn Collins, K.C. in reply.

BENNETT J. The only question which has to be decided in this action is whether the performance of the two works in question on November 20, 1932, was a performance of those two works " in public." If it was, the defendants infringed the rights which are conferred upon the plaintiffs, as owners of the performing rights, by virtue of s. 1, sub-s. 2, of the Copyright Act, 1911.

The defendants' hotel is unlicensed. It has accommodation for about 175 guests, and regularly, for the past four years, on Sunday evenings the trio, engaged on November 20, 1932, has played in the lounge. In addition to playing on Sunday evenings it plays at tea time during the Christmas and Easter holidays.

On November 20, 1932, a number of guests were sleeping at the hotel. Some of them were in the lounge on the occasion in question. There was also present an emissary of the plaintiffs (accompanied by a friend) who went there for the purpose of hearing whether any piece of music, to the copyright of which the plaintiffs were entitled, would be played by the trio.

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(1) (1884) 13 Q. B. D. 843, 853.

(2) [1927] 1 Ch. 526.

I think that it is quite plain, on the evidence, that any member of the public who had given notice to the defendants of his desire to dine at the hotel on November 20, 1932, or on any other Sunday, would have been allowed to have dinner there, provided that he appeared to be respectable. No doubt he would also have been at liberty to go into the lounge and listen to the music performed by the trio. In other words any respectable member of the public who was prepared to pay the price charged by the defendants either for consuming meals in their hotel, or for staying there, was at liberty to listen to the music performed by the trio engaged by the defendants.

In my judgment the performance by the defendants in these circumstances was a performance "in public," and the rights which the plaintiffs have under the statute have been infringed. The rights of the plaintiffs have been challenged by the defendants and the plaintiffs are entitled to an injunction restraining the defendants, their servants and agents, for the duration of the copyright, from performing in public the two musical works in question.

Solicitors: *Syrett & Sons; Smith, Fawdon & Low, for Edward H. Bone, Bournemouth.*

J. L. D.

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March 20, 21, 23; April 11.

In re FREDERICK DAVID SASSOON.

COMMISSIONERS OF INLAND REVENUE v. RAPHAEL.

[1932. S. 050.]

In re RONALD EDWARD DAVID SASSOON.

COMMISSIONERS OF INLAND REVENUE v. EZRA.

[1932. S. 051.]

Will—Settled Share of Residue—Condition as to Settlement of other Property on like Trusts—Settlement—Recital of Intention to comply with Condition—Trust in Default of Children—Construction—Error causing resulting Trust—Forfeiture—Forfeiture only discovered after Settlor's Death—Estate Duties paid on his Death in Respect of Share of Residue—Claim to recover.

By his will dated December 18, 1912, a testator gave his residuary estate to his two children in equal shares, but settled each child's share upon trusts in favour of that child and his or her issue, with an ultimate trust in default of issue providing that the share should be "dealt with as if such child had died in my lifetime without leaving any child living at my death." Each child's share was made liable to forfeiture if he or she failed to execute within six months of the testator's death or of attaining twenty-one years of age a settlement of his or her interests under certain other trusts to the satisfaction of the trustees of the will, and "so far as possible on the lines of the settlement" of his or her share of residue, with one permitted variation. The testator died on May 4, 1917, and on July 23, 1917, the testator's son made a settlement of those other interests in which it was recited that he was desirous in accordance with the provision in the testator's will of settling these interests and that the settlement had been prepared to give effect to this desire and that the trustees of the testator's will were satisfied with the settlement (as testified by their being parties to the settlement), and that it was so far as practicable on the lines of the settlement of the son's share of residue in the testator's will with the permitted variation. The trusts declared accorded with the settlement of the son's share of residue, except that the trust in default of issue provided that, subject to the permitted variation, the trust fund should be dealt with as if the settlor had died in the lifetime of the testator without leaving any child living at the death of the testator. The son died in 1924 a bachelor, and estate duty was paid in respect of his share of residue, and the rate of duty on his free property was increased by aggregation of the share. In 1930 Luxmoore J. held on a summons taken out in the matter of the trusts of the settlement that there was at the death of the settlor

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a resulting trust in his favour. In 1932 two petitions were brought to recover estate duty said to have been overpaid on the son's death on the ground that as a result of Luxmoore J.'s decision the son's share of residue became forfeited on November 5, 1917, and therefore did not pass on his death. Farwell J. accepted this contention, holding that, although the Crown was not a party to the summons before Luxmoore J., it could not escape from the effect of his decision on the contruction of the settlement :—

Held, by the Court of Appeal : (1.) that in order to comply with the condition in the testator's will the settlement to be made by the son must not only satisfy the trustees, but also be so far as possible on the lines of the settlement of his share of residue in that will ; (2.) that as the ultimate trust contained in the operative part of the settlement was clear and unambiguous it was not possible to construe it so as to give effect to the son's intention as declared by him in the recitals : the principle laid down in *Ex parte Dawes* (1886) 17 Q. B. D. 275, 286, and *Mackenzie* v. *Duke of Devonshire* [1896] A. C. 400 applied ; and (3.) that the settlement did not fulfil the condition in the testator's will, with the result that the son's share of residue was forfeited on November 5, 1917.

Per Lawrence and Romer L.JJ. : The Crown is not bound by a decision as to construction in proceedings to which it is not a party, where that decision implicitly determines whether or not property passed on the death of a person who is already dead.

Two Appeals from Farwell J.

By a petition dated August 5, 1932, brought by the trustees of the will of Frederick David Sassoon (hereinafter called "the testator"), under s. 10 of the Finance Act, 1894, the trustees appealed against the decision of the Inland Revenue Commissioners refusing to repay the sum of 285,941*l.* 15*s.* 1*d.* claimed to have been overpaid in duty at the death of the testator's son, Ronald Edward David Sassoon (hereinafter called "Ronald"), in respect of the testator's residuary trust estate.

By his will dated December 18, 1912, the testator, after appointing executors and trustees of his will and making various bequests, by cl. 5 gave the remainder of his property to his trustees upon trust for such son or sons of his as should be living at his death and attain twenty-one and if more than one in the shares therein mentioned, and in default of any such son upon trust for such daughter or daughters of his as should be living at his death and attain twenty-one or marry under that age, and if more than one in equal shares.

The testator then provided by cl. 7 of his will that his trustees should retain the share of each child of his under cl. 5 thereof and the legacy under cl. 3 thereof of each daughter of his who should be living at his death and should attain twenty-one or marry under that age and should stand possessed thereof and the accumulations (if any) of income during the minority of such child and the investments for the time representing the same (hereinafter called such child's "portion") and the income thereof upon the trusts therein mentioned for the benefit of such child and his or her children, and then by sub-cl. (*f*) provided: "If a child of mine shall not have any child who under the trust in default of appointment hereinbefore contained shall attain a vested interest in his or her portion then subject to the trusts and powers herein contained in favour of such child and his or her issue such portion and all accumulations (if any) of income or so much thereof respectively as shall not have become vested or been applied under any trust or power affecting the same shall be dealt with as if such child had died in my lifetime without leaving any child living at my death." Various trusts, powers and provisions followed which it is not material to set out.

Cl. 8 of the testator's will was as follows: "Whereas my children or some or one of them may under one or both of the following documents namely my marriage settlement dated the first day of October 1894 and the will of my father-in-law Edward Lewis Raphael become entitled under any appointment or in default of appointment on the death of either my wife or myself and partly in one event and partly in the other to interests in the funds subject to the trusts of those documents respectively *Now* for the protection and benefit of my children I will and direct as follows:—

(*a*) Each child of mine shall at the expense in all things of my residuary estate and before the expiration of six calendar months after my death or if he or she shall be under twenty-one at my death before the expiration of six calendar months after he or she shall attain twenty-one by deed settle the interest whatever it may be and whether under any appointment or in default of appointment absolute contingent in possession or reversion or otherwise in the funds or any of the funds subject to the trusts of the said settlement and will or either of them and shall make such settlement to the satisfaction of my trustees (other than the settlor if a trustee) and so far as possible on the lines of the settlement contained in the last preceding clause hereof so far as applicable but with the modification that the settlor shall in default of children have a general power of appointment by will or codicil over one-half of the capital fund settled and so that such settlement shall contain such powers and provisions as my trustees (other than those as aforesaid) shall approve.

(*b*) And I further direct that if he or she shall be living at the expiration of the period aforesaid and be then of capacity to make the settlement aforesaid and shall not then have made such settlement then his or her portion shall be forfeited and my will shall take effect in all respects as if he or she had died in my lifetime without leaving any issue living at my death.

. . . .

(*d*) Provided also that my trustees (save than as aforesaid) shall have power to waive the provisions of the said sub-clause [(*a*)] to such an extent that they (other than as aforesaid) shall think fit in order to enable any son of mine to obtain money for the purpose of paying or discharging any debts liabilities or obligations whether legally binding or not incurred before my death and whether before he attains twenty-one or afterwards."

The testator died on May 4, 1917, leaving his wife Jeannette surviving him and two children only—namely, Ronald, who was born on November 8, 1895, and Muriel Helene, who was born on April 19, 1897, and married Alfred Ezra in March, 1918. She and her husband were two of the petitioners.

At the date of the testator's death Ronald was interested under various instruments as follows:—

(*a*) By the testator's marriage settlement dated October 1, 1894, certain moneys and investments (therein referred to as the "husband's trust fund"), and certain other investments (therein referred to as the "wife's trust fund") were (in the events which had happened) settled upon trust for the testator's widow Jeannette Sassoon during her life and after her death on trust for the issue of the said marriage as she should by deed, will or codicil appoint and in default of appointment in trust for the children or child of the said marriage who being sons or a son should attain the age of twenty-one years or being daughters or a daughter should attain that age or marry, and if more than one in equal shares.

(*b*) By a deed poll dated April 15, 1899, Edward Lewis Raphael settled certain securities upon the like trusts and with and subject to the like powers and provisions as by and in the said marriage settlement were declared and contained with respect to the wife's trust fund.

(*c*) By the will (hereafter called the "Raphael will") dated July 6, 1899, and proved on September 7, 1903, of Edward Lewis Raphael, a fund stood settled upon trust for Jeannette Sassoon during her life and after her death as to income not exceeding a moiety of the income for the benefit of any husband surviving her to whom she might by will appoint or bequeath the same during his life or for any less period and subject thereto in trust for her issue as she might by will appoint and in default of appointment in trust for such of her children as should attain twenty-one or being daughters should marry under that age and in equal shares.

By a settlement (hereinafter called "Ronald's settlement") dated July 23, 1917, after recitals of the testator's marriage settlement, the deed poll of April 15, 1899, and the Raphael will and the will of the testator, and that Ronald (the settlor) was desirous in accordance with the provisions of cl. 8 of the testator's will of settling his interest whatever it might be and whether under any appointment or in default of appointment absolute contingent in possession or reversion or otherwise in all the property, funds and moneys subject to the trusts of the marriage settlement and the Raphael will respectively, and that the settlement had been prepared in order to give effect to this desire of the settlor and contained such powers and provisions as the trustees of the testator's will approved, and that they were satisfied with the settlement and that it was so far as possible on the lines of the settlement contained in cl. 7 of the testator's will so far as applicable with the modification mentioned in sub-cl. (*a*) of cl. 8, and that such approval and satisfaction was testified by their being parties to and executing the settlement, the settlor assigned all his present and future interests under the marriage settlement and the deed poll and the Raphael will to trustees upon trusts for the benefit of himself and his issue according with the trusts declared in cl. 7 of the testator's will, and then by cl. 5 it was provided as follows: "If the Settlor shall not have any child who under the trust in default of appointment hereinbefore contained shall attain a vested interest in the trust fund then subject to the trusts and powers herein contained in favour of the Settlor and his issue the Trust Fund and all accumulations (if any) of income or so much thereof respectively as shall not have become vested or been applied under any trust or power affecting the same shall be held as to one half thereof in trust for such person or persons or purposes as the Settlor shall by will or codicil appoint and as to the other half part and in default of and until and subject to any appointment also as to the first mentioned half shall be dealt with as if the Settlor had died in the lifetime of the said Frederick David Sassoon without leaving any child living at the death of the said Frederick David Sassoon."

Ronald died intestate and a bachelor on July 11, 1924, and estate duty amounting to 280,169*l.* 10*s.* 4*d.* was claimed from the three trustees of the testator's will on the footing that the property comprised in the residuary trust estate of the testator passed on Ronald's death. The sum of 285,941*l.* 15*s.* 1*d.* (of which 5772*l.* 4*s.* 9*d.* represented interest) was accordingly paid out of such residuary trust estate in respect of this estate duty.

By an order dated October 14, 1930, made on a summons taken out by two of the trustees of Ronald's settlement, the short title whereof is *In re Sassoon's Settlement Trusts.*

Ezra v. *Ezra* [1930 S. 2329], Luxmoore J. declared that upon the true construction of the settlement and in the events which had happened "there was at the date of the death of Ronald Edward David Sassoon a resulting trust in his favour and that the property comprised in the said settlement formed part of the estate of the said Ronald Edward David Sassoon deceased and passed to his legal personal representative the defendant Muriel Helene Ezra."

The petitioners contended that as in these circumstances Ronald had failed to make such a settlement as was required by the testator's will, he either did not take or forfeited his portion, with the result that no part of the testator's residuary trust estate passed on his death and no part of the duty was in fact payable; and then claimed to recover it as having been paid under a bona fide mistake of fact.

The Commissioners having rejected the petitioners' claim to repayment, the petitioners asked the Court for a declaration that no estate duty became payable in respect of the residuary estate of the testator by reason of the death of Ronald, and for an order for repayment of 285,941*l.* 15*s.* 1*d.* with interest thereon at the rate of 3 per cent. per annum.

By a second petition dated August 5, 1932, brought by Mrs. Ezra as the sole personal representative of Ronald, she appealed under s. 10 of the Finance Act, 1894, from the decision of the Inland Revenue Commissioners refusing repayment of estate duty claimed to have been overpaid by her as such personal representative in respect of Ronald's estate.

On Ronald's death estate duty computed at the rate of 32 per cent. and amounting to 78,526*l.* 13*s.* 1*d.* was claimed from the petitioner. This claim was based on the footing that there fell to be included (1.) as part of Ronald's estate the sum of 11,300*l.* (being the apportioned amount of the dividends and interest accruing on the death of Ronald on the investments and property comprised in the residuary estate of the testator), and (2.) for purpose of aggregation and consequent ascertainment of the rate of duty the value at the date of Ronald's death of the said residuary estate.

Estate duty amounting to 78,526*l.* 13*s.* 1*d.* (with 859*l.* 1*s.* 10*d.* interest) was paid by the petitioner in respect of this estate.

The petitioner alleged that by reason of circumstances already stated Ronald was not entitled to any part of the said dividends and interest, and the value of the said residuary estate did not fall to be included for purposes of aggregation; and that for these reasons the sum of 22,343*l.* 13*s.* 3*d.* and the interest paid thereon were repayable by the Commissioners. The Commissioners having refused the petitioner's application for repayment, she claimed by her petition a declaration that estate duty to the extent of 22,343*l.* 13*s.* 3*d.* was overpaid in respect of Ronald's residuary estate; and an order for the Commissioner to repay the said sum with interest thereon.

The two petitions were heard together, and on November 30, 1932, Farwell J., in giving judgment, said that the decision of Luxmoore J. in regard to the construction of Ronald's settlement was given on October 14, 1931, on an originating summons to which the trustees of the settlement and all persons beneficially interested under it were parties, but the Crown was not. Counsel who was concerned to say that in the events which had happened the property was held upon trusts similar to those in cl. 8 of the will, then informed the Court that he felt unable to put forward such a contention, and upon that Luxmoore J. made his declaration that on the true construction of the settlement there was a resulting trust to the settlor on his death. There was no appeal from that order, and as the time for appealing had long expired it must be taken as finally determining the rights of the parties in the settled fund.

In these circumstances the question to be determined was whether on the death of Ronald any property passed so far as the residuary estate of the testator was concerned. That was a question of fact, but the answer to it must depend on the true construction of the settlement and the will.

As already pointed out, so far as the beneficiaries were concerned, it must be taken as finally determined that in the events which had happened the property, subject to the trusts of the settlement, became absolutely vested in Ronald

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and formed part of his estate; and that gave rise at once to the question whether the settlement so construed complied with the conditions imposed by cl. 8 of the will.

On behalf of the Crown it had been argued that it did, because on the true construction of cl. 8, one condition and one only was imposed by the testator—namely, that the settlement should be to the satisfaction of his trustees, and since they were satisfied that was an end of the matter. In his (his Lordship's) judgment that contention was not well founded. Cl. 8 of the will imposed two conditions: (1.) that the trustees should be satisfied, and (2.) that the settlement should be so far as possible on the lines of the settlement contained in the last preceding clause of the will. If that was so, did the settlement as construed by Luxmoore J. fulfil the conditions? In his (his Lordship's) judgment it did not. The testator clearly intended that in the event of his son dying without issue the settled fund should be held on trust for his daughter and her issue, and this intention was completely defeated by the settlement. It followed that Ronald forfeited all his interest in the testator's residuary estate on November 5, 1917, with the result that, since he had no interest in the residuary estate of the testator at his death, no property passed and no estate duty was payable in respect of that residue.

It was said, however, that the Crown was not bound by the order of Luxmoore J., since it was not a party to these proceedings, and that it was now open to the Crown to contend that the construction put upon the settlement by Luxmoore J. was wrong; that on its true construction the property was now held upon trusts for Mrs. Ezra and her issue, and that consequently the settlement complied with the conditions of cl. 8 of the will, and there was no forfeiture. He (his Lordship) was unable to accept this argument. It was of course a truism that in proceedings such as those in question no one was bound by an order if he was not a party to the proceedings. But the question whether property passed on the death of Ronald was a question of fact and, assuming that he had correctly construed the will, the fact was that no property passed on Ronald's death, since at that time he had no interest in it. That fact was the result of the order made by Luxmoore J., and since that order had finally determined the rights of the parties under the settlement, the Crown could not in his judgment escape from its consequences, although not technically bound by it. It was impossible now to avoid or disregard the fact that Ronald at his death was not a beneficiary under the will of the testator, and no decision upon the construction of the settlement could alter that state of affairs, unless it were by appeal from Luxmoore J.'s judgment.

For these reasons the petitioners were entitled to recover so much of the duty as was paid on the footing that the residuary estate of the testator passed on Ronald's death.

The Commissioners appealed, and the appeal was heard on March 20, 21 and 23, 1933, and judgment was given on April 11, 1933.

The Commissioners, while the appeal was pending, had applied to the Court of Appeal for leave to be joined as parties to and to appeal from the decision of Luxmoore J. on the construction summons, but on the matter coming before the Court of Appeal on December 19, 1932, it was ordered that the application should stand over to come on with the appeal on the two petitions.

Sir Thomas Inskip A.-G., *Fergus Morton K.C.*, and *J. H. Stamp* for the appellants. The respondents are not entitled to the repayment of the duties claimed, for Ronald's settlement sufficiently complied with the testator's direction in cl. 8 of his will to prevent a forfeiture. The first ground on which it is so contended is that cl. 8 on its true construction only required the settlement to be made to the satisfaction of his trustees. The second provision as to the settlement that it shall be "so far as possible on the lines of the settlement contained" in cl. 7 of his will is merely directory, and the failure to comply with it does not cause a forfeiture. If this were not so, it would have been unnecessary to provide for the trustees being satisfied.

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The second ground on which there is no forfeiture is that Ronald's settlement on its true construction is " on the lines of the settlement contained " in cl. 7 of the testator's will. The Court must not look only at the operative part of the deed but at the recitals; and when a clear intention has been ascertained from the document itself, the Court will give effect to it even if it becomes necessary to insert words that have been omitted: *Roe* d. *Wilkinson* v. *Tranmarr* (1), where Willes L.C.J. quotes an observation of Hale L.C.J. that "judges ought to be curious and subtle (astuti) to invent reasons and means to make acts effectual according to the just intent of the parties." It is true that the intention will be inferred from the words used, but it must be ascertained from the whole document, including the recitals. When this has been done, then if a definite intention emerges which has been defeated by a mistake of the draftsman, the words will be made the servants and not the masters of the intention: Hawkins on Wills, 2nd ed., p. 6; *Gwyn* v. *Neath Canal Co.* (2); *Langston* v. *Langston* (3); *Smith* v. *Packhurst.* (4) These cases show that everything turns on the intention of the settlor as ascertained from the deed itself, and there can be no doubt that if Ronald's settlement is not construed as a compliance with the provision in cl. 8 of the will, so as to prevent a forfeiture, the whole intention of the deed is defeated. The intention was to make such a settlement as would avoid a forfeiture.

[ROMER L.J. Supposing that the parties took a mistaken view in thinking that the settlement avoided a forfeiture, can we modify it so as to avoid a forfeiture ?]

The Court must find a purpose not only to avoid forfeiture but to make a settlement having that effect.

[LAWRENCE L.J. referred to *Grey* v. *Pearson.* (5)]

Here the Court should infer from the intention that the latter part of cl. 5 of the settlement should be construed as providing that the trust fund was to be dealt with either as

(1) (1758) Willes, 682, 684.
(2) (1868) L. R. 3 Ex. 209.
(3) (1834) 2 Cl. & F. 194.
(4) (1742) 3 Atk. 135, 136.
(5) (1857) 6 H. L. C. 61, 99.

if it had been part of the testator's estate and the settlor had died in his lifetime without leaving any child living at the death of the testator, or as the settlor's share under the testator's will would have gone if the settlor had died in the testator's lifetime without leaving any child living at his death: *Lloyd* v. *Lloyd* (1); *In re Akeroyd's Settlement.* (2) A difficulty is created by *Ex parte Dawes* (3), where Lord Esher said that "if both the recitals and the operative part are clear, but they are inconsistent with each other, the operative part is to be preferred." But in the present case the respondents' contention is that the material provision in cl. 5 is meaningless as it stands, and if so, resort should be had to the recitals, which make it perfectly clear what the intention was. The operative words ought not to be construed as meaningless, if without doing violence to the deed as a whole they can be given a meaning and words can be added to give effect to the clear intention.

This argument involves a submission that Luxmoore J.'s order is wrong. That order was made without argument, as counsel for the infants said he thought the case unarguable. It is contended that the argument now put forward ought to prevail. Farwell J. held that the decision of Luxmoore J. determined a fact which the appellants must accept. If necessary, the appellants ask for leave to appeal against that order, but it is contended that his decision was only binding on the parties before him and that the Crown is free now to contend the contrary.

[LORD HANWORTH M.R. The Court's present view is that the Crown is not bound by the decision, but if a different view is arrived at later, the Crown shall be heard upon it.]

Wilfrid Greene K.C., *Gavin Simonds K.C.*, *Andrewes-Uthwatt*, and *A. T. Macmillan* for the respondents. For the reasons stated by Farwell J. his decision was right, as was also that of Luxmoore J. What the appellants are really seeking is not to construe Ronald's settlement but to rectify it. There is no means of knowing what exactly was intended by the

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(1) (1837) 2 Myl. & Cr. 192.

(2) [1893] 3 Ch. 363.

(3) 17 Q. B. D. 275, 286.

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material clause in that settlement. Various additions have been suggested, and in this respect the present case differs fundamentally from *In re Akeroyd's Settlement* (1), where there was no doubt what words the settlor intended to use. Further it is sought to add words to a provision in the settlement which is not, as it stands, ambiguous. The recitals can only be used to clear up an ambiguity in the operative part: *Bath and Mountague's Case* (2). "Where the recitals and the operative part of a deed are at variance, the operative part must be officious and the recitals inofficious. I do not say inoperative, for the recitals may be useful in explaining ambiguities": per Romilly M.R. in *Young* v. *Smith* (3); and see *Bird* v. *Lake* (*No.* 1) (4) and *Bailey* v. *Lloyd.* (5) In *In re Ethel and Mitchells and Butlers' Contract* (6) the Court refused to read into the habendum of a reconveyance the word "simple," the conveyance having been made to the use of the mortgager "in fee." The narrative cannot control the directions in a deed: *Mackenzie* v. *Duke of Devonshire.* (7) There, as here, it was sought to control clear provisions by the initial statement of the motive of the author of the deed. Clear and unambiguous words cannot be construed by reference to the settlor's intention as recited: per Jessel M.R. in *Howard* v. *Earl of Shrewsbury.* (8) Other statements to the same effect are contained in *Walsh* v. *Trevanion* (9); *Ex parte Dawes* (10); and *Orr* v. *Mitchell.* (11)

[LAWRENCE L.J. referred to *Cave* v. *Horsell.* (12)]

It is an abuse of language to say that the settlor intended to use some particular set of words. All that the recitals show is that he intended to make a settlement which would prevent a forfeiture.

As regards the authorities relied on by the appellants, no assistance is to be derived in the case from *Roe* d. *Wilkinson* v. *Tranmarr* (13), and *Gwyn* v. *Neath Canal Co.* (14) relates in the

(1) [1893] 3 Ch. 363.
(2) (1693) 3 Ca. Ch. 55, 98, 101.
(3) (1865) L. R. 1 Eq. 180, 183.
(4) (1863) 1 H. & M. 111.
(5) (1829) 5 Russ. 330, 344.
(6) [1901] 1 Ch. 945.
(7) [1896] A. C. 400.
(8) (1874) L. R. 17 Eq. 378, 394.
(9) (1850) 15 Q. B. 733, 751.
(10) 17 Q. B. D. 275.
(11) [1893] A. C. 238, 254.
(12) [1912] 3 K. B. 533.
(13) Willes, 682.
(14) L. R. 3 Ex. 209.

main to a matter of estoppel, and in so far as the judgments dealt with construction, they have very little bearing on this case, so too *Langston* v. *Langston* (1) and *Smith* v. *Packhurst* (2) do not assist the Court in dealing with this case. In *Lloyd* v. *Lloyd* (3) there is no question of adding words. *In re Akeroyd's Settlement* (4) has gone further than any other case, but in that case there was no doubt what the settlor meant to say. That case may be compared with *In re Tredwell* (5) and *Stanford* v. *Stanford.* (6)

In not one of the cases relied on by the appellants has the Court done what it is asked by them to do here.

[LAWRENCE L.J. referred to *In re Haygarth.* (7)]

That is a case where two passages in a will do not fit together, and the Court had to decide whether to reject the one or the other. Here the Court is construing a clause in the operative part, that is, ascertaining its meaning. That meaning being clear there is no room for a variation in the meaning by adding words or otherwise. It is not a case where a passage is susceptible of two meanings so as to enable the Court to look at other parts of the document to remove the ambiguity. The Court is being asked to give clear words a meaning they do not possess by reference to the settlor's intention as expressed in another part of the deed. That would be rectification and not construction, and it is not therefore open to the Court to do it. It is said that the respondents' contention is that the provision in question is meaningless. That is not so; words may be perfectly clear and yet ineffective in their application, and that is the position here. It is a misuse of language to call what the Court is being asked to do the construction of a deed: see *Mackenzie* v. *Duke of Devonshire.* (8)

Again, Ronald's settlement did not need only the approval of the trustees of the testator's will. It was not the intention to make the trustees masters so that they could allow any alteration and variation in the terms of the settlement. The

(1) 2 Cl. & F. 194.
(2) 3 Atk. 135.
(3) 2 Myl. & Cr. 192.
(4) [1893] 3 Ch. 363.
(5) [1891] 2 Ch. 640.
(6) (1886) 34 Ch. D. 362.
(7) [1913] 2 Ch. 9.
(8) [1896] A. C. 400, 405.

fact that one modification of the terms of the trusts declared by the testator in regard to his residuary estate is expressly permitted shows that otherwise the settlement was to be strictly on the lines of those trusts. So, too, in regard to a power of waiver subsequently given to the trustees. If it was meant to make the trustees arbiters of the form of the settlement to be made by Ronald, there is a recognized way of doing it: see Key and Elphinstone's Precedents in Conveyancing, 12th ed., vol. ii., p. 851, and Prideaux's Precedents in Conveyancing, 22nd ed., vol. iii., p. 794.

Lastly, the appellants, confronted with Luxmoore J.'s decision, have applied for leave to appeal against it. That they are not entitled to, for they never could have been proper parties to the proceedings before him. It frequently happens that the rights of A. may depend on the determination of rights between B. and C., but that does not give A. any right to intervene. The Crown becomes entitled to duty on the property of the subject while it is in transit, but it is not a necessary party to proceedings to ascertain the subject's rights. Here it was only if the interest in the testator's residue was Ronald's at his death that the Crown was entitled to duty, and its right to this duty would only attach after it had been determined that the property was Ronald's at the date of his death.

[ROMER L.J. The Crown says that its claim to duty arose before Luxmoore J.'s decision, and that the decision was given after the Crown's right had supervened.]

The only way to ascertain the true construction of Ronald's settlement was by proceedings to which the beneficiaries under that settlement were the only proper parties. The result of that decision was that Ronald had not in fact made the form of settlement necessary to prevent a forfeiture. That is a fact which can be altered by nothing that the Crown or this Court can now do. The decision of Luxmoore J. is binding on the beneficiaries and cannot be altered, and it results in a forfeiture of Ronald's interest under the testator's will.

[They also referred to White and Tudor's Leading Cases in Equity, 9th ed., vol. ii., p. 746.]

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J. H. Stamp in reply. It is not contended that in a case where it has been decided in a life tenant's lifetime that his interest ended more than three years before his death, the Court would not be bound to accept the decision, although not a party to it. The matter was settled between the parties interested at a time when the Crown had no interest. That is not so here, for the Crown had an interest by way of charge at the time of Luxmoore J.'s decision, and had a right to intervene: *Attorney General* v. *Constable.* (1) To suggest that the Crown is not entitled to be heard in an action which directly raises the question whether the charge for duties is valid is entirely novel. Whenever a decision may be used to defeat an accrued right of the Crown, the Crown is a proper party. As regards the construction of Ronald's settlement the Crown's claim is to have the canons of construction laid down in *Smith* v. *Packhurst* (2) applied. The question is not one of rectification, but of determining what disposition is intended to be referred to and incorporated in the deed by a particular formula. The Court should not allow itself to be baffled by the mere form of words. The recitals show the settlor's clear intention to incorporate the trusts declared in the testator's will in regard to his share of residue. The Court should be astute to avoid a construction that makes the particular trust meaningless: *Lloyd* v. *Lloyd.* (3)

Cur. adv. vult.

1933. April 11. Their Lordships read the following judgments:—

LORD HANWORTH M.R. These two petitions claim repayment by the Inland Revenue of moneys paid for estate duty on the death of Ronald Sassoon, and in both the same questions of law arise for decision.

The relevant facts for the purpose of this judgment can be stated very shortly. They are fully stated by Farwell J.

Frederick David Sassoon (hereinafter called "the testator") made his will on December 18, 1912, and he died on May 4,

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(1) (1879) 4 Ex. D. 172.

(2) 3 Atk. 135.

(3) 2 Myl. & Cr. 192.

1917, leaving a widow and a son and a daughter. The son, Ronald Sassoon, attained his majority on November 8, 1916, some six months before his father's death; and his daughter was married and became Mrs. Ezra in March, 1918, attaining the age of twenty-one years about a month afterwards. The two children were entitled to interests in the funds, subject to the trusts of their parents' marriage settlement dated October 1, 1894, and also of the will of their maternal grandfather, Edward Lewis Raphael.

In consequence of this, the testator in his will imposed a term upon his children that they should make a settlement of their interests under the marriage settlement and under their grandfather's will. The terms of this direction are: "I will and direct as follows:—(*a*) Each child of mine shall at the expense in all things of my residuary estate and before the expiration of six calendar months after my death or if he or she shall be under twenty-one at my death before the expiration of six calendar months after he or she shall attain twenty-one by deed settle the interest whatever it may be and whether under any appointment or in default of appointment absolute contingent in possession or reversion or otherwise in the funds or any of the funds subject to the trusts of the said settlement and will or either of them and shall make such settlement to the satisfaction of my trustees (other than the settlor if a trustee) and so far as possible on the lines of the settlement contained in the last preceding clause hereof so far as applicable but with the modification that the settlor shall in default of children have a general power of appointment by will or codicil over one-half of the capital fund settled and so that such settlement shall contain such powers and provisions as my trustees (other than those as aforesaid) shall approve. (*b*) And I further direct that if he or she shall be living at the expiration of the period aforesaid and be then of capacity to make the settlement aforesaid and shall not then have made such settlement then his or her portion shall be forfeited and my will shall take effect in all respects as if he or she had died in my lifetime without leaving any issue living at my death."

It will be seen that the penalty was the exclusion from taking any interest whatever under the testator's will. On July 23, 1917, and so within the time limit, Ronald executed a settlement of these interests, for the purpose, as the recitals in it declare, of fulfilling the condition imposed by his father's will and securing his interest under it.

The trustees under the testator's will accepted the settlement as fulfilling its purpose, and Ronald enjoyed his interest under the will until his death on July 11, 1924. He died intestate and a bachelor, and without having exercised the power of appointment given him by the settlement.

Mrs. Ezra, as his sole next of kin, obtained a grant of letters of administration of his estate. Questions arose as to the true construction of the ultimate trusts of the settlement of July 23, 1917, and an originating summons was taken out to obtain a decision upon them. The trustees and all persons beneficially interested under it were parties to the summons, but the Crown was not, and was not represented at the hearing. On October 14, 1930, Luxmoore J. decided that upon the true construction of the settlement, and in the events that happened, there was after the date of Ronald's death a resulting trust in favour of Ronald, and thus that the property comprised in the settlement formed part of his estate and passed to his legal personal representative, Mrs. Ezra.

The result of this decision was accepted by the trustees of the testator's will, and Mrs. Ezra, as declaring that the settlement failed to comply with or satisfy the terms of cl. 8 of the testator's will, with the consequence that Ronald had forfeited all his interest under that will as from the expiration of the six months allowed for compliance therewith; that is, from November 5, 1917. They claimed respectively two sums, 285,941*l.* 15*s.* 1*d.* (of which 5772*l.* 4*s.* 9*d.* represented interest) overpaid in respect of the residuary estate of the testator on the footing that it had "passed" on Ronald's death; and 22,343*l.* 13*s.* 3*d.*, and interest paid thereon, overpaid in respect of Ronald's free estate. These claims were rejected by the Commissioners, and on August 5, 1932,

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these two petitions were presented by the trustees and Mrs. Ezra in her representative capacity as personal representative of Ronald's estate, by way of appeal under s. 10 of the Finance Act, 1894, from the decision of the Commissioners.

Sect. 8, sub-s. 12, provides that where it is proved to the satisfaction of the Commissioners that too much estate duty has been paid, the excess shall be repaid by them, and s. 10 provides an appeal by any person aggrieved by the decision of the Commissioners with respect to the repayment of any excess of duty paid.

Farwell J. decided in favour of the petitioners, and the Crown appealed.

The main point for decision is whether the settlement can be construed and given effect to as a compliance with the requirements of cl. 8 of the testator's will. The Attorney-General contends that it can, because (*a*) effect ought to be given to the document as a whole, and it is plain from the recitals that the only purpose of the settlement was "to give effect to the aforesaid desire of the settlor"; and (*b*) the forfeiture clause ought to be construed strictly. On the other hand, the petitioners contend that the plain meaning of the settlement is to effect a resulting trust in favour of Ronald, and that the plain meaning of the clause cannot be set aside, because the recitals indicate that the operative part did not carry into effect the intention of the settlor, as recited; that such a contention involves a rectification, and is not a matter of construction.

Two minor contentions of the Crown can be dealt with shortly and put aside. It is argued that, inasmuch as the trustees of the testator's will were "satisfied," the terms of cl. 8 were complied with; that cl. 8 (*a*) prescribes one test and one only—namely, that such a settlement shall be made "to the satisfaction of my trustees." I cannot take this view. The words of the clause are too plain: "shall . . . . by deed settle . . . . and shall make such settlement to the satisfaction of my trustees." Two conditions are, by the above words, expressly demanded; the conjunction introduces the second, and does not place the first under, or within, the control of the second. There are many minor points, subsidiary to the main requirement that a settlement as directed shall be made, in which the satisfaction of the trustees may be exercised. The words, "so far as possible on the lines of the settlement contained in the last preceding clause hereof so far as applicable," indicate that deviation within certain limits was permissible, and those limits were matters on which the satisfaction of the trustees was required.

Secondly, the waiver by the trustees in sub-cl. (*d*) cannot be resorted to to save the forfeiture. That waiver was permissible for a particular and specified purpose, and cannot be adduced to save a settlement which is imperfect or ineffectual for the purpose required by the settlor.

The Attorney-General applied to this Court on December 19, 1932, that the time for appealing from the decision of Luxmoore J. on October 14, 1930, should be extended so that he might lodge an appeal from the decision, and, in particular, because the Crown were not parties to the summons or represented at the hearing. We adjourned the application till the hearing of the substantive appeal was heard and now we are of opinion that it is unnecessary.

There is a consensus of opinion as to the effect of the clause in the settlement according to its terms simpliciter. It does leave a resulting trust in favour of Ronald. The settlement so construed is ineffective for the purpose of complying with the requirements of the testator's will so as to avoid a forfeiture thereunder. But it is claimed that the words of the clause are controlled by the purpose revealed in the recital and must be so construed, although they are unmeaning as they stand. It is said that the settlement must be construed as a whole—purpose and effect must be brought into harmony; and on this basis the judgment of Luxmoore J. was wrong. The question, therefore, before us, as it was before Luxmoore J., is: Can the clause in the settlement be so construed as to effect the purpose of the settlement?

Various additions to or amendments of the clause were suggested on behalf of the appellants. None of them could be compressed into a simple addition of a word or two—indeed, they were illustrative of the necessity for rectification rather than of the possibility of interpretation.

The Attorney-General referred us to a number of cases, such as *Roe* d. *Wilkinson* v. *Tranmarr* (1), in which a deed was held good as a covenant to stand seised, though it failed to operate as a release as it had been intended to do ; and he urged us to follow the judgment in that case which accepted the doctrine of Hale L.C.J., "that the judges ought to be curious and subtle (astuti) to invent reasons and means to make acts effectual according to the just intent of the parties." He relied upon the authorities collected in Norton on Deeds, 2nd ed., p. 91, which justify the statement that "omitted words may be supplied : words may be transposed ; parentheses may be inserted ; and false grammar or incorrect spelling may be disregarded : if the intention of the parties sufficiently appear from the context." Thus in *Langston* v. *Langston* (2) an implication was made in a will to include the eldest son under the words "all and every other the son and sons" : and see per Kelly C.B. in *Gwyn* v. *Neath Canal Co.* (3)

The rule laid down by Lord Wensleydale in *Grey* v. *Pearson* (4) is in broad terms : "I have been long and deeply impressed with the wisdom of the rule, now, I believe, universally adopted, at least in the courts of law . . . ., that in construing . . . . all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no farther." Sir George Jessel accepts those words as embodying the right principles : see *Ex parte Walton.* (5)

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(1) Willes, 682, 684.

(2) 2 Cl. & F. 194.

(3) L. R. 3 Ex. 209, 215.

(4) 6 H. L. C. 61, 106.

(5) (1881) 17 Ch. D. 746, 751.

Lord Esher M.R., in *Ex parte Dawes* (1), collected the rules applicable as between recitals and the operative part. "If the recitals are clear and the operative part is ambiguous, the recitals govern the construction. If the recitals are ambiguous, and the operative part is clear, the operative part must prevail. If both the recitals and the operative part are clear, but they are inconsistent with each other, the operative part is to be preferred."

It will thus be seen that there is no obscurity as to the rules to be applied in the construction of this settlement. The recitals are plain and reveal the purpose of the deed explicitly. The operative part, read in the grammatical and ordinary sense of the words used in it, is also clear. Ronald's words are plain. He tried and failed to effect his purpose. Can the Court misread his words, or replace them, in order to repair his mistake or blunder ?

It has in many cases refused to do this, even though the original purpose was clear : see *Young* v. *Smith* (2), and in *In re Ethel and Mitchells and Butlers' Contract* (3), Joyce J. refused to supply the word " simple " to the word " fee " by way of construction of a reconveyance. " When the words in the dispositive or operative part of a deed of conveyance are clear and unambiguous they cannot be corrected by reference to other parts of the instrument " : see per Lord Macnaghten in *Orr* v. *Mitchell.* (4) The motive of the settlors cannot be used to alter the nature and ordinary effect of the words used in the instrument : see *Mackenzie* v. *Duke of Devonshire.* (5) In my opinion, if the Court was to construe the settlement as carrying into effect the purpose or motive which is contained in the recitals, it would be rejecting the words used by the settlor and we should be rectifying this deed under the guise or pretence of construing it.

There is one case about which I must add a few words : *In re Akeroyd's Settlement.* (6) In that case the Court of Appeal decided, reversing North J., who had followed the decision of *In re Tredwell* (1) in the Court of Appeal, that by construction it was possible to supply what had not been expressed in a marriage settlement. The funds subject to it were settled upon trust to pay the income to the wife for life, and after her death to the husband until he should become bankrupt or until he should do some act or some other event should occur whereby the said income if payable to himself would have vested in some other person or persons, or until his death, which should first happen, and then a gift over after the decease of the survivor of the wife or husband upon trust for the children of the marriage. In the lifetime of his wife the husband's creditors passed a resolution for the liquidation of his affairs by arrangement, and after her husband's liquidation and after he had obtained his discharge, the wife died leaving him surviving. The Court held that upon her death the income of the trust fund belonged to the children.

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(1) 17 Q. B. D. 275, 286.
(2) L. R. 1 Eq. 180.
(3) [1901] 1 Ch. 945.
(4) [1893] A. C. 238, 254.
(5) [1896] A. C. 400, 406.
(6) [1893] 3 Ch. 363.

The Court held the intention that the gift over should take effect upon the determination of the husband's life interest, not only upon his death but also upon the alienation of his life interest, was plain, that the mistake could be corrected by construction and did not require a suit to rectify that particular kind of flaw in the instrument. It was argued that the Court could and would act on a necessary implication in order to carry out the intention of the parties. The case seems to carry construction as distinguished from rectification to its zenith.

It may be said that what was missing was only a few words to express that the gift over was to take effect upon bankruptcy or assignment. It does not appear to be a sufficient authority to supply what is needed in the present settlement to effect the purpose of the recitals.

For these reasons I am of opinion that the appeals fail and must be dismissed with costs.

LAWRENCE L.J. In the first place, I am clearly of opinion that the Crown is not bound by the order made by

(1) [1891] 2 Ch. 640.

Luxmoore J. declaring that on the true construction of the settlement of July 25, 1917, there was at the date of the death of Ronald Sassoon a resulting trust in his favour. The proceedings in which that declaration was made were commenced after the death of Ronald Sassoon, and therefore after any estate duty which might have become payable upon his death in respect of the testator's estate had become a charge upon that estate. Moreover, the Crown had on the death of Ronald Sassoon made a claim for estate duty on the footing that there was no resulting trust, and the estate duty had been paid. It is obvious, therefore, that the Crown was directly and vitally interested in the question submitted to Luxmoore J. for decision, and not having been made a party to the proceedings instituted for the purpose of determining that question the Crown is not bound by the declaration made by that learned judge. In these circumstances it is open to the Crown in the present proceedings to contend that the declaration made by Luxmoore J. is erroneous and that on the true construction of the 1917 settlement there was no resulting trust.

This contention raises a question of considerable difficulty. It is common ground that there has been a serious blunder in drafting the 1917 settlement, and the issue between the parties is whether that blunder can be put right by construing the settlement in the way in which it is contended by the Crown it ought to be construed, or whether that blunder cannot be put right without the rectification of the settlement, which is now impossible. The essential distinction between construing and rectifying a document so as to carry out the intention of the parties to it is that in construing a document the Court has to ascertain the meaning of the words employed by the parties to express their intention and not to ascertain what the parties meant to express, whereas in rectifying a document the Court has regard to extrinsic evidence proving what the parties meant to, but did not, express.

It is a well established principle of construction that in order to ascertain the true meaning of the words employed in a deed the whole deed must be considered. Thus in

Clayton v. *Glengall* (*Earl*) (1) Lord St. Leonards said: "It is quite true, I am not to conjecture or guess at what might have been the intention of the parties, but I am to consider the whole instrument, and if there appear a plain intention to give interest, then, though there should be no express words to that effect, and this is the case of a deed, yet I am bound to give it that construction." And in *Beaumont* v. *Marquis of Salisbury* (2) Sir John Romilly said: "I adopt the observations of Alexander C.B. in *Colmore* v. *Tyndall* (3) that this Court deals with a deed according to the clear intention of the parties appearing in the four corners of the deed itself. If the Court sees an intention clearly and distinctly established by it, it has no great difficulty in carrying that into effect." In *Roe* d. *Wilkinson* v. *Tranmarr* (4) Willes L.C.J. said: "In the case of *Crossing* v. *Scudamore* (5) . . . . Lord Chief Justice Hale cited the opinion of Lord Hobart (expressed in *Clanrickard* v. *Sidney* (6)), and declares himself to be of the same opinion that the judges ought to be curious and subtle (Lord Hobart used the word *astuti*) to invent reasons and means to make acts effectual according to the just intent of the parties." And in *Mill* v. *Hill* (7) Lord Truro said: "The general principle—that of construing a deed according to the intention, where by any possibility you can do so—is clear enough."

The application of this general principle may be said to have reached high-water mark in the case of *In re Akeroyd's Settlement* (8), where this Court held that on the true construction of a marriage settlement whereby a trust fund belonging to the wife was settled upon trust to pay the income to the wife and after her death to the husband until he should become bankrupt or alienate the same or until his death, which should first happen, and after the decease of the survivor of the wife and husband then upon trust for the children of the marriage, the limitation over in favour of the

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(1) (1841) 1 Dr. & W. 1, 14.
(2) (1854) 19 Beav. 198, 206.
(3) (1828) 2 Yo. & J. 605, 622.
(4) Willes, 684.
(5) (1671) 2 Lev. 9.
(6) (1615) Hob. 273, 277.
(7) (1852) 3 H. L. C. 828, 850.
(8) [1893] 3 Ch. 363.

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children took effect on the death of the wife, the husband being then alive but being a liquidating debtor. Lindley L.J. in delivering his judgment said (1): "Looking only at the recitals and at the operative part of the deed, it does appear to me to be as plain as can be, that the real intention of the parties was that this property was to go to the children upon the determination of the life interest of their parents. I cannot doubt that for a moment. I do not call that guessing. The intention is plain; but by a piece of bad drafting the draftsman has failed to give full effect to that plain intention, because in the gift over he has confined it to one of the events instead of putting in some general words which would cover the whole; but that particular kind of flaw does not require a suit to rectify the instrument. The mistake can be corrected by construction provided the intention is clear and plain from the document itself."

In applying this general principle of construction, however, the Court must be careful not to embark upon conjecture. "The Court cannot understand the true intention of the indenture but only by the words in the indenture": *Kidder* v. *West.* (2) In *Rickman* v. *Carstairs* (3) Denman C.J. said: "The question in this and other cases of construction of written instruments is, not what was the intention of the parties, but what is the meaning of the words they have used." Further (and this is particularly pertinent to the present case), it is a well established rule that recitals of intention cannot operate to control or vary unambiguous expressions in the operative part of a deed. This rule is strikingly illustrated by the case of *Mackenzie* v. *Duke of Devonshire* (4), a case which was much relied upon by the respondents in the present case. Lord Halsbury said (5): "It seems to me to be absolutely unarguable that the true meaning of . . . . the purposes of the trust so set forth" (in the operative part of the deed) "can be in any way controlled, qualified, or modified by the initial statement of what the

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(1) [1893] 3 Ch. 366.
(2) (1684) 3 Lev. 167.
(3) (1833) 5 B. & Ad. 651, 663.
(4) [1896] A. C. 400.
(5) Ibid. 405, 406.

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motive of the author of the deed was. It would to my mind be disastrous to introduce such a system of construing a deed. One has known the language of a will somewhat perverted to perform the function which it was assumed the testator intended to be performed, but I never in my life heard of the language of a deed which contained a perfectly unambiguous provision being twisted from the natural ordinary meaning of the words by a preliminary statement of what the maker of the deed intended should be the effect and purpose of the whole deed when made." Lord Watson in the same case said (1): "The ground upon which the judgment of the Court below proceeds really comes to this, that to read the words" (in the operative part) "in the sense in which I think they ought to be read would be at variance with the main purpose of the deed as declared in the narrative of it. My Lords, I think that is carrying the principle of construction by intention too far. I can quite understand that where words are capable of being modified or qualified in the context in which they occur it may be legitimate to ascertain how far one reading or another would best promote the intention of the maker of the deed. . . . The narrative words come to no more than this, 'My intention is to do' so and so, and you may add this, 'and I have accomplished that purpose by the provisions which follow.' In such a case the safer and only legitimate course is to look to the provisions which follow, and to read them according to their natural and just construction." Lord Davey said (2): "I take it to be a settled principle of law that the operative words of a deed which are expressed in clear and unambiguous language are not to be controlled, cut down, or qualified by a recital or narrative of intention."

It remains to apply the principles to which I have referred to the construction of the 1917 settlement. The recitals in that settlement show plainly that the settlor intended to make a settlement to avoid a forfeiture of his share under his father's will. The relevant parts of the will are recited, and then there are recitals that in accordance with the provisions of cl. 8 of the will the settlor was desirous of settling his interest, etc., and that those presents had been prepared in order to give effect to the aforesaid desire of the settlor. The beneficial trusts in favour of the settlor and his children and remoter issue are taken practically verbatim from the testator's will, but in framing the ultimate trusts in default of issue the draftsman seems to me to have failed to realize that the settlement was dealing with the property of the settlor and not with the property of the testator. The ultimate trust (in default of appointment and in default of any child of the settlor attaining a vested interest) directed that the trust fund should be dealt with as if the settlor had died in the lifetime of the testator without leaving any child living at the death of the testator. This trust is couched in unambiguous language, and if construed according to the plain meaning of the words employed has no legal effect, as the objects are insufficiently defined, with the consequence that there is a resulting trust in favour of the settlor, and the settlement is not a settlement so far as possible on the lines of the settlement contained in cl. 7 of the will of the testator.

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(1) [1896] A. C. 407.

(2) Ibid. 408.

In these circumstances (bearing in mind the maxim that such a construction should whenever possible be placed on deeds "ut res magis valeat quam pereat"), the difficult question arises whether the Court can construe the words employed to express the ultimate trust in the 1917 settlement in such a way as not only to render that trust effective, but also so as to render it a trust which would conform to the provisions of cl. 8 of the testator's will. I confess that I have found considerable difficulty in making up my mind on this question. It is obvious on the face of the deed that the draftsman has blundered by having copied words from the will which are effective when applied to the testator's estate, but are ineffective when applied to the trust fund comprised in the settlement. It seemed to me at one time during the course of the argument that by implying some simple words a sensible meaning might be given to the clause in question, which would carry out the intention of the settlor as recited in the settlement; but on further consideration I have come to the conclusion that there is an insuperable difficulty in the way of doing this as a matter of construction. The recitals merely indicate the general desire of the settlor to make a settlement in accordance with the provisions of the will. Under cl. 8 of the will the settlement is to be to the satisfaction of the trustees, and so far as possible on the lines of the settlement contained in cl. 7 of the will. There are various ways in which that object might be effected, but the recitals afford no clue as to the particular way in which the settlor intended to effect his object. The difficulty which counsel for the Crown have had in expressing in exact language how, according to their contention, the ultimate trust ought to be construed, has gone a long way to convince me that to accede to one or other of the suggested constructions of the ultimate trust would involve the rectification and not the construction of the settlement.

It is plain that the trustees might properly have been satisfied with a settlement whereby the property settled was either amalgamated with the testator's estate or was made the subject-matter of an independent settlement upon similar trusts so long as it was a settlement on the lines of the settlement contained in cl. 7 of the will. There is nothing in the recitals or elsewhere in the settlement to guide the Court to a clear conclusion which of these two alternatives was intended by the settlor or approved by the trustees. The difference between the two kinds of settlement in the operation of the hotchpot and other clauses is obvious.

Again, there is nothing in the settlement to guide the Court in coming to a conclusion as to what the settlor intended to be the ultimate trust of the settled fund in the event of both the settlor and his sister Mrs. Ezra dying without leaving any child who should live to attain a vested interest. It would be mere conjecture to assume that the settlor had in that event intended to part with his entire interest in the settled fund.

The truth is that a draftsman entrusted with the task of drawing up a settlement on the lines of the settlement in cl. 7 of the will in the year 1917, when the settlor and his sister were both alive and comparatively young people, would require to know precisely how the settlor intended that the trusts to take effect after the settlor's death without issue should be framed, and especially what were his intentions in the event of both himself and his sister dying without issue. Moreover, after those trusts had been framed in accordance with the settlor's intentions it would have become necessary to ascertain whether the trustees were satisfied with the proposed settlement. It is more than probable that the settlor when he executed the settlement had not directed his mind to the question how the settled property was to devolve in the event of both himself and his sister dying without issue who should live to attain a vested interest.

In these circumstances I have come to the conclusion that the Court cannot properly as a matter of construction hold that the clear intention of the settlor appears within the four corners of the settlement itself, and therefore that the declaration made by Luxmoore J. was right.

There only remains the question whether, although the settlement was not so far as possible on the lines of the settlement contained in cl. 7 of the will, yet the settlor did not forfeit his interest under the will, because the settlement was made to the satisfaction of the trustees. On this question I agree with the decision of Farwell J. In my opinion the making of a settlement to the satisfaction of the trustees is not the only condition imposed on the settlor. Clause 8 of the will imposes the further condition that the settlement is to be so far as possible on the lines of the settlement contained in cl. 7 of the will. The subsequent provisions of cl. 8, permitting a modification of the terms of the settlement by conferring a general testamentary power of appointment to the extent of one-half of the capital fund settled upon the settlor in default of children, and providing that the settlement should contain such powers and provisions as his trustees should approve, in my opinion conclusively show that the stipulation as to the lines upon which the settlement should be made was not merely directory, but was a condition which had to be observed and which the trustees could not dispense with.

For the reasons stated I agree that this appeal fails and should be dismissed with costs.

ROMER L.J. (whose judgment was read by LORD HANWORTH M.R.). One may feel quite sure that Ronald Sassoon intended to settle his interests under his parents' marriage settlement and his grandfather's will in such a way as would avoid a forfeiture of his portion under the will of his father. The real difficulty in the case is to resist the temptation to depart from sound principles of construction for the purpose of carrying that intention into effect. Those principles require that the true meaning of the words employed in the settlement of July 23, 1917, should be ascertained without reference to the question of the consequences that the use of such words may have upon the dispositions contained in the will of Frederick David Sassoon. If the words of the settlement when construed without reference to the provision for forfeiture in the will would have a particular meaning attributed to them, they cannot be made to bear a different meaning merely by reason of that provision. The intention of the settlor as manifested by the settlement is, of course, to be given effect to so far as possible, and in case of any ambiguity in the operative part of it, the recitals may be properly looked at for the purpose of ascertaining that intention, including the recital of the provisions for forfeiture contained in his father's will. But whether the recitals be looked at or not, the thing that has to be ascertained is what settlement did Ronald Sassoon intend to make, and not what results did he intend or hope to achieve by making it. If I may be permitted to adapt some words used by Lord Watson in the case of *Mackenzie* v. *Duke of Devonshire* (1), all that can be said as regards the settlor's intention is this: His intention was to make a settlement such as was directed by cl. 8 of his father's will and so avoid a forfeiture of his portion, and he thought that he had accomplished that purpose by

(1) [1896] A. C. 400, 407.

the provisions he inserted in the settlement. The fact, if fact it be, that he was mistaken in so thinking can have no bearing upon the question of what those provisions are. There is nothing whatsoever to be found within the four corners of the instrument that gives the slightest indication of what construction the settlor himself put upon cl. 8 of his father's will. For all that I know to the contrary he may have thought that any settlement that satisfied the trustees of the will, or one containing a trust in default of children of his in the terms of cl. 5 of the settlement, was sufficiently on the lines of the settlement contained in cl. 7 of the will to comply with the directions contained in cl. 8. If the trust in default of children of his had been one for himself in plain terms, no Court could have refused to give effect to such a trust merely because it might result in a forfeiture of the settlor's portion under his father's will. In point of fact the trust is by no means plain. It is difficult to construe. But, in construing it, how can the Court be assisted by the recital of the provision for forfeiture, when it is in complete ignorance of what kind of trust the settlor thought would be sufficient to avoid one? The recital gives no assistance at all, and the meaning of the trust must be ascertained independently of it.

Turning now to the trust in question it provides that, in the event of the settlor having no child who shall attain a vested interest in the trust fund, then that fund shall, subject to a general testamentary power of appointment over one-half reserved to the settlor, "be dealt with as if the settlor had died in the lifetime of the said Frederick David Sassoon without leaving any child living at the death of the said Frederick David Sassoon."

The natural meaning of the words "as if" is "as the fund would have been dealt with." The settlor has, however, recited the settlement of his portion by the will, and in settling the trust fund seems to be following very closely the lines of the will settlement of his portion. It is, therefore, arguable that he used the words "as if" as meaning "as the settlor's portion under the will would have been dealt with if." I do not in any case think that such a construction would be permissible. But it need not be further considered, as it would lead to nothing. For if the settlor had died in the lifetime of his father without children, he would never have had a portion at all; and the settlement of which he is following the lines would not have existed.

In these circumstances it must be the trust fund itself that becomes the subject-matter of the inquiry how it would have been dealt with upon the hypothesis referred to. Now, unfortunately, this inquiry cannot be answered. For in order to find out how the trust fund would have to be dealt with in the event mentioned further data are requisite. One would have to know whether the settlor is to be deemed to have disposed of the property in his lifetime, and if so, to what person or persons, or whether he is deemed to have died possessed of it, and, if he died possessed of it, whether he is to be deemed to have died testate or intestate.

The result is that if the words are taken literally there is a resulting trust for the settlor, as was declared to be the case by the order of Luxmoore J., for the objects of the trust have not been sufficiently defined. Such a conclusion, however, is one that the Court will not arrive at, if there can be found in the settlement as a whole an indication of the settlor's intention to use the words in other than their literal and ordinary sense. Now our attention was drawn during the argument to several cases, and many others are to be found in the books, in which the Court has departed, and in some cases departed widely, from the literal meaning of words contained in wills or settlements. Such cases are sometimes referred to as cases in which the Court has "supplied" or "struck out" words. This is, perhaps, a convenient way of referring to them, but it is in strictness an entirely inaccurate way. Except in actions for rectification the Court has no power whatsoever of adding to or subtracting from the words of a written instrument. A testator or a settlor may, however, in the instrument itself indicate sufficiently plainly that he is using certain words or phrases in other than their literal and ordinary meaning. In such cases he is said to have provided his own dictionary, and the Court will construe such words and phrases in the light of that dictionary. A testator may, for instance, show that he uses the word "children" as including illegitimate children, or the words "my nephews" as including "my wife's nephews." In one case, a settlor was found to have shown by the language he used that in his dictionary the word "son" included a "daughter," and in a few cases a testator has been found to have used an even stranger dictionary than that. In some cases it must be confessed it requires some ingenuity to discover from the document being construed the intention to use language in other than its ordinary meaning; but in none of such cases has the Court ever asserted the right to depart from the ordinary meaning unless such an intention could in fact be found. As was said by Lindley L.J. in *In re Akeroyd's Settlement* (1): "The mistake can be corrected by construction provided the intention is clear and plain from the document itself."

Now what is there to be found in the settlement itself that indicates an intention on the part of the settlor to use the words of the trust in question in other than their ordinary meaning? For myself I can find nothing. Down to the trust in default of children the settlor has followed very closely the trusts of his portion contained in the will, and when he comes to provide for that event he does so in the words used in the will for that purpose, departing from those words no more than was necessary to adapt them to a settlement and to provide for his testamentary power of appointment over one-half of the fund. This circumstance, so far from affording an indication that the settlor intended the words used to bear other than their ordinary meaning, seems to show the very opposite. The corresponding words in the will are clearly used in their ordinary meaning, and they have been copied by the settlor. He has unfortunately copied without intelligence and without realizing that when transferred to his settlement the words would bring about a result widely different from the result they achieved in the will.

(1) [1893] 3 Ch. 363. 367

This, however, can be no justification for giving to the words a meaning other than the meaning they bear in the will. The settlor has made a mistake, but one that could only be put right, if at all, in an action for rectification. As I read the settlement, the words he has used are the words that he intended to use and to use in their ordinary meaning. A Court of construction is powerless to alter them—and they would have to be altered drastically in order to bring about the result that the settlor intended to achieve by making his settlement. To do this they would have to be construed as though they provided that, in the event of the settlor having no children, the trust fund, subject to the settlor's testamentary power of appointment over one-half of it, should be held upon trusts corresponding to the trusts upon which the settlor's portion under the will would be held in the event of no child of his attaining a vested interest in such portion. For in my opinion, and for the reasons given later, no ultimate trust differing in effect from that would have avoided the operation of the forfeiture clause. Such a construction, however, is impossible. I accordingly arrive at the conclusion that the order made by Luxmoore J. as to the meaning of the settlement was right.

The next question is whether Farwell J. was right in holding that upon that construction the forfeiture clause in the will took effect. In my opinion he was, and for the reasons that he gives. If any settlement that happened to be to the satisfaction of the trustees was to be a sufficient compliance with the obligations imposed upon Ronald Sassoon by cl. 8 of the will, it is almost impossible to understand why the testator should have taken pains to indicate the one particular in which a departure from the lines of the settlement contained in cl. 7 was to be permitted. The testator in terms has imposed two conditions of the settlement to be made. One condition was that it was to be to the satisfaction of his trustees; the other was that the settlement should be so far as possible upon the lines of the settlement contained in cl. 7, so far as applicable, with one modification expressly indicated. I can see no reason for rejecting either the one condition or the other. The first one would ensure that such an important matter as the selection of the trustees of the settlement would be subject to the approval of the trustees of the will, as well as the terms of the investment clause, and such like matters. The second condition would ensure that one-half of Ronald's share under the marriage settlement and the grandfather's will, in the event of his having no children, would go to his sister and her children, and be kept in the family. I cannot find an indication in the will that the testator regarded this condition as less important than the first. I suspect that he regarded it as the more important of the two. I cannot at any rate find any justification for departing from the words of the will which prima facie require the performance of two conditions, and not merely of one. If this view of the matter be right, it is plain that the forfeiture clause took effect.

A settlement under which the beneficial interest in the trust fund remained vested absolutely in Ronald in default of children cannot possibly be regarded as a settlement so far as possible on the lines of the settlement of Ronald's portion under the will.

In these circumstances it becomes unnecessary to express any final opinion upon the question whether Farwell J. was right in the view that he took of the conclusive effect of the order of Luxmoore J., as to the construction of Ronald Sassoon's settlement. I need only say this. Upon the death of a person the Crown becomes entitled to estate duty upon the property passing or that is to be deemed to pass upon such death, and in the case of property that does not pass to the executor as such, the duty is actually made a charge upon the property, which charge until the duty is paid would appear to be vested in the Crown. Whenever, therefore, after the death of a person a question arises whether certain property does or does not pass, or is or is not in such a situation as to be deemed to pass, upon that death, the Crown is directly interested in that question, and cannot be deprived of any rights it may have in the matter by the decision of the Court given in its absence. Where, however,

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any question as to a person's interest in any property falls to be dealt with by the Courts in that person's lifetime, no claim of the Crown in respect of estate duty payable upon his death has come into existence, and the Crown is in no way interested from that point of view in the question that is being litigated. On the person's death, therefore, the Crown could not question a decision given in his lifetime as to his interest in the property. It would be in no better position in that respect than the representatives of the deceased would be. Like them its interests would only have come into being after the decision has been given.

For these reasons I agree that these appeals should be dismissed.

Solicitors: *Solicitor of Inland Revenue; Sanderson, Lee & Co.*

H. C. G.

Applied. Gibson *v.* South American Stores [1950] 1 Ch. 177

Applied. Gibson *v.* South American Stores (Gath & Chaves), Ltd. [1949] 2 All E.R. 985.

In re TALBOT.

JUBB *v.* SHEARD.

[1933. T. 379.]

MAUGHAM J.
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May 23, 24.

Charity—United Methodist Church—Trust for Ministers' Salaries—Proviso for Defeasance on Union with "Other Religious Body"—Union with other Methodist Churches—Proviso Void for Perpetuity—Methodist Church Union Act, 1929 (19 *&* 20 *Geo.* 5, *c. lix.*), *s.* 18.

By s. 18 of the Methodist Church Union Act, 1929 (an Act to authorize the union of the Wesleyan Methodist, Primitive Methodist, and United Methodist Churches): "All personal or movable property (other than chattels real . . . .) at the date of union . . . . held in trust for or on behalf of . . . . the United Methodist Church . . . . or for the purposes of any . . . . charity subsidiary or ancillary to [the United Methodist Church] shall as from that date be deemed to . . . . be held in trust for . . . . the purposes of the Methodist Church or the . . . . charity subsidiary or ancillary to the Methodist Church nevertheless in other respects upon the same trusts . . . . as those upon . . . . which the same were previously held so far as circumstances will permit."

A testator directed that after his wife's death a sum of money should be held upon trust to invest and to apply the income in augmenting the salaries of the ministers of the United Methodists' chapel at Batley: with a proviso that "in case the said chapel and property connected therewith shall, in the opinion and absolute discretion of the trustees or trustee for the time being of my will, at any time cease to be used for the preaching and teaching the doctrine of the said United Methodists, or for any other reason . . . . shall cease to exist for the said purpose, or the said United Methodists at Batley shall become merged in or united with some other religious body, then the said sum . . . . shall be held upon trust for such of my nephews and nieces . . . . as shall be living at my death in equal shares." About four years after the testator's wife's death, the Wesleyan Methodist, Primitive Methodist, and United Methodist Churches became merged and united in accordance with the Methodist Church Union Act, 1929:—

Held, (1.) that the trust created by the testator's will was for a particular kind of charity and that the will showed no general charitable intent:

(2.) that the proviso was void for perpetuity and therefore did not affect the trust:

(3.) that the Act enlarged the trust, which, under s. 18, continued as a trust "subsidiary or ancillary to" the purposes of the Methodist Church and was a charity to augment the salaries of ministers of the chapel.

In re Bowen [1893] 2 Ch. 491 and *In re Peel's Release* [1921] 2 Ch. 218 followed.

In re Randell (1888) 38 Ch. D. 213 and *In re Blunt's Trusts* [1904] 2 Ch. 767 considered and distinguished.

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ADJOURNED SUMMONS.

George Bennington Talbot (hereinafter called "the testator"), by his will dated November 12, 1928, provided (inter alia) that ". . . . the sum of two thousand pounds . . . . shall be held upon trust to invest and to pay and apply the income in and towards the augmentation of the salaries of the ministers officiating at the chapel of the United Methodists at Batley . . . . called Zion Chapel . . . . Provided always . . . . that in case the said chapel and property connected therewith shall in the opinion and absolute discretion of the trustees or trustee for the time being of the said (*sic*) will at any time cease to be used for the preaching and teaching the doctrine of the said United Methodists or for any other reason the said chapel and property shall cease to exist for the said purpose or the said United Methodists shall become merged in or united with some other religious body, then the said sum . . . . shall be held upon trust for such of my nephews and nieces . . . . as shall be living at my death in equal shares. . . . ." The testator died in November, 1928, and his wife in December, 1929. As from September 20, 1932, the Wesleyan Methodist, Primitive Methodist, and United Methodist Churches became merged and united in accordance with the Methodist Church Union Act, 1929, and this summons was taken out by a trustee of the will for the determination (inter alia) of the question whether, upon the true construction of the will and in the events which had happened, and in particular the union of the United Methodist Church with the Wesleyan Methodist and Primitive Methodist Churches pursuant to the Act (*a*) the trust in favour of the trustees of the chapel continued and the gift over in the will had not taken effect or was void; or (*b*) the gift over was valid and as from September 20, 1932, or some and what other date took effect and the fund and the income thereof were as from that date and at the date of the summons held in trust for the testator's nephews and nieces referred to in the will; or (*c*) the trust in favour of the chapel came to an end as from that date and the fund and the income formed part of the testator's residuary estate.

Wilfrid M. Hunt for the trustee of the will.

A. Guest Mathews for the remaindermen. The proviso is valid notwithstanding the rule against perpetuities. The gift over will take effect after any length of time : *In re Randell* (1) ; *In re Blunt's Trusts.* (2) There are two authorities to the contrary—namely, *In re Bowen* (3) and *In re Peel's Release* (4), but they depend on the original gifts being made in perpetuity and are therefore distinguishable. In the present case there are no words of perpetuity.

E. M. Winterbotham for the residuary legatees. The question whether the gift is for a limited period or is for ever, with a superadded proviso that it shall be cut down in certain events, is a question of construction. If it is an absolute gift in perpetuity it cannot be cut down, but on its true construction it is not an absolute gift.

Vaisey K.C. and *J. V. Nesbitt* for the trustees of the chapel. In the present case there is a good charitable gift in perpetuity. In such a case a gift over cannot take effect unless it is a gift to another charity: *In re Davies.* (5) Here there is no limitation of time within which the gift over may take effect.

MAUGHAM J. The question that arises for decision in this case is whether a trust for the augmentation of the salaries of ministers officiating at the chapel of the United Methodists at Batley called Zion Chapel is one that continues in operation notwithstanding the union of the United Methodist Church with the churches called the Wesleyan Methodist Church and the Primitive Methodist Church pursuant to the Methodist Church Union Act, 1929. [His Lordship then stated the facts, and continued :] I propose first to consider the true construction of the will and in particular the effect, if any, of the proviso in favour of nephews and nieces. In that connection there are four authorities the effect of which I ought shortly to state. The first is the case of *In re Randell* (1), a decision of North J.

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(1) 38 Ch. D. 213.
(2) [1904] 2 Ch. 767.
(3) [1893] 2 Ch. 491.
(4) [1921] 2 Ch. 218.
(5) [1915] 1 Ch. 543.

The testatrix in that case bequeathed a certain sum on trust to pay the income to the incumbent of the Church of Holy Trinity at Hawley and to his successors as incumbents so long as he and his successors should permit the sittings to be occupied free, and there was a direction or declaration that, in case any such incumbent should make any claim for and receive payment in respect of the sittings in the said church, thenceforth the said trust moneys should fall into the residuary personal estate of the testatrix and be dealt with accordingly. North J. held, first, that there was no general charitable intent and, secondly, that there was a charitable bequest for a particular limited purpose, and that as soon as that particular purpose came to an end the fund necessarily fell into residue. The direction that the fund was to fall into residue was only a statement of the way in which the fund would go in the absence of such a direction and, accordingly, it was not obnoxious to any rule of law, although, if the gift had to be relied on as a clause of defeasance or a gift over, it would have been void for perpetuity. The learned judge accordingly held that the direction that the trust moneys were in the event mentioned to be dealt with as part of the residuary personal estate of the testatrix was not void for perpetuity. It will be noted that the gift there was expressly a gift so long as the incumbent should permit the sittings to be occupied free of charge.

That case was followed by a decision of Buckley J., as he then was, in *In re Blunt's Trusts.* (1) There the testatrix gave to trustees a sum sufficient to produce twenty pounds a year, and directed them to pay that income to the treasurer for the time being of a school called the Bicknor and Hucking National Schools for the support of the schools so long as they should be carried on under the conditions contained in the trust deed of the schools, and the funds necessary for carrying them on should be supplied by voluntary contributions: and she then declared that the gift should be void if any one of three events should happen in her lifetime—

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(1) [1904] 2 Ch. 767.

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namely: (1.) If a school board for the parish should be formed; (2.) if the funds necessary for carrying on the schools should be raised under powers contained in any Act of Parliament; and (3.) if a trust should be created and a sufficient fund set apart for carrying on the schools under the deed of trust; and she further declared that if either of the two first mentioned events should happen after her death, then that the payment of the annuity was to cease and that the fund which produced the sum was to fall into her residuary estate. After her death, which happened in 1900—namely, in the year 1904—the Board of Education issued a final order for the appointment of foundation managers of the school (which seems to have been treated as a single institution), with the result that the school could no longer be carried on under the provisions of the trust deed. Buckley J. held that the school was no longer carried on under the conditions contained in the trust deed, and therefore that the annuity had come to an end. He then held that the annuity fund fell into the residue by operation of law and that it was unnecessary to consider whether the gift over to residue was void as an infringement of the rule against perpetuities. The learned judge thus followed the decision of North J. in *In re Randell.* (1) He did not express an opinion whether there was a general charitable intent, although I incline to the view that he must have considered there was not such an intent shown on the will as a whole. It will be observed that in that case, as in the case of *In re Randell* (1), the trusts were expressly trusts declared to operate for a time—namely, they were declared to run so long as the school should be carried on under certain conditions.

However, there are two cases where the decision based on the terms of the will or deed in question was in the other direction. The first is the decision of Stirling J. in *In re Bowen.* (2) The testator there bequeathed two sums of money to trustees upon trust to establish schools in certain parishes and to continue the same schools for ever

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(1) 38 Ch. D. 213.

(2) [1893] 2 Ch. 491.

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thereafter. He then declared: "If at any time hereafter the Government of this kingdom shall establish a general system of education, the several trusts of the said several sums . . . . shall cease and determine, and I bequeath the said several sums in the same manner as I have bequeathed the residue of my personal estate." The learned judge, after pointing out that the rule against perpetuities had no application to the transfer in a certain event of property from one charity to another, stated that that principle did not apply to cases where a gift in favour of a charity was followed by an executory gift in favour of private individuals and, accordingly, an executory gift, after a gift in favour of a charity, in favour of private individuals, is within the rule. "On the other hand," he pointed out (1), "as property may be given to a charity in perpetuity, it may be given for any shorter period, however long; and the interest undisposed of, even if it cannot be the subject of a direct executory gift, may be left to devolve as the law prescribes": and he cited *In re Randell* (2) with approval as an example of that rule. Then he said: "The question which I have to decide, therefore, appears to me to reduce itself to one of the construction of the testator's will—i.e., whether the testator has given the property to charity, in perpetuity, subject to an executory gift in favour of the residuary legatee, or whether he has given it for a limited period, leaving the undisposed of interest to fall into residue." On that point he cited *Pearks* v. *Moseley* (3) and said that the sums in question were bequeathed to trustees who were obviously selected with a view to the efficient administration of the trusts and the testator directed the trustees "to establish certain schools, 'and to continue the same schools forever thereafter'", and upon these considerations the learned judge thought that, on the true construction of the will, there was "an immediate disposition in favour of charity in perpetuity, and not for any shorter period. That," he went on to say, "is followed by a gift over if at any time the

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(1) [1893] 2 Ch. 491, 494, 495, 496.

(2) 38 Ch. D. 213.

(3) (1880) 5 App. Cas. 714.

Government should establish a general system of education; and under that gift over the residuary legatees take a future interest conditional on an event which need not necessarily occur within perpetuity limits. It follows that the gift over is bad; . . . ."

The last decision to which I have to refer is that of Sargant J., as he then was, in *In re Peel's Release.* (1) There the learned judge had to deal with a deed dated 1837 by which certain land was granted and released to trustees upon trust "to permit and suffer the same to be forever thereafter used as and for a place for the instruction of 70 poor children, ... in the principles of the Church of England as by law established, and in reading, writing, casting accounts and other proper, useful and common learning for poor children." Then the deed provided that if by reason of any law or Statute of the Realm, or otherwise, the release should, as to the charitable purposes thereby intended to be made and established, either not take effect, or, having taken effect, should afterwards cease or determine or be defeated or, the precise object of the release being for the education of poor children in the principles of the Church of England, become prevented, then the trustees for the time being should stand seised of the land and the school-house, if any, to be built thereon in trust for the settlor, his heirs and assigns. The school was built and was carried on until 1920, when, the income of the fund being insufficient for the maintenance of a schoolmaster and schoolmistress, the school became practically derelict. It was held by the learned judge that the event contemplated by the clause of reverter had arisen, but that the clause was void as a perpetuity and that, the original gift being expressed to be perpetual, there could be no reverter or resulting trust to the settlor's heir or personal representatives, either of the school and site, or of the endowment fund. He thus followed *In re Bowen* (2) and distinguished *In re Randell* (3) and *In re Blunt's Trusts.* (4) It is a little unfortunate, from the point of view of affording

(1) [1921] 2 Ch. 218.
(2) [1893] 2 Ch. 491.
(3) 38 Ch. D. 213.
(4) [1904] 2 Ch. 767.

me assistance, that the two cases in favour of the one result are cases where the gift was expressly for a limited time, and that the two cases in favour of the other result are expressly gifts in perpetuity. The present case is one where, under the will, there is no express gift for a limited time and, on the other hand, there is no express gift in perpetuity. The form of the gift, in my opinion, is such that, having regard to the will as a whole, it is a gift to effect a particular mode of charity in a case where there is no general charitable intent, with the result that, apart from the operation of the Act, there would be no ground for the application of the cy près principle. In considering whether there is or is not a general charitable intent, a thing which is not capable of exact definition, the Court, I think, has to consider the whole scope and effect of the will and may rely on a proviso of the nature of a defeasance clause, whether or not such a clause is open to objection on the ground of perpetuity. In my opinion, however, in the present case the effect of s. 18 of the Act is that the trust will continue, apart from the operation (if any) of the proviso in the will, as a trust subsidiary or ancillary to the purposes of the Methodist Church, that is, it would be a trust for the augmentation of the salaries of the ministers of the Methodist Church at Zion Chapel, which has become a chapel of the Methodist Church, with this modification, that the ministers will be ministers of the United Church instead of ministers of the United Methodist Church. What, then, is the effect, if any, of the proviso ? As a clause of defeasance, if it is to be so construed, it is void for perpetuity. I accept entirely what Sargant J. observed in *In re Peel's Release* (1), following the words of Stirling J. in *In re Bowen* (2), that the question is reduced to one of construction of the will—namely, " 'whether the testator has given the property to charity, in perpetuity, subject to an executory gift in favour of the residuary legatee, or whether he has given it for a limited period, leaving the undisposed of interest to fall into residue.' " In considering the question it seems to me I must bear in mind the fact that the trust is one which

(1) [1921] 2 Ch. 218, 224, 225.

(2) [1893] 2 Ch. 491.

under s. 18 of the Act must be deemed, as from the date of union, to be a trust for the purposes of the Methodist Church or the corresponding charity subsidiary or ancillary thereto. The effect of the Act in my opinion is to modify the trust contained in the will, and with that in mind I cannot hold that the testator, who has not expressly limited the period of the trust, must be treated as having given the income until the United Methodists shall become united with some other religious body. My conclusion is that the proviso, in view of the Act, can have effect, if at all, only as a clause of defeasance. So regarded, it is void for perpetuity, and the trust will continue modified in the way in which it must be modified pursuant to the Act.

Solicitors: *Gibson & Weldon; Walker, Rowe & Clark, for W. Gledhill, Dewsbury; Jaques & Co., for Hick & Hands, Scarborough; Torr & Co., for Donald G. Ineson, Cleckheaton.*

K. R. A. H.

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May 24, 25, 26 ;
June 20.

PREMIER CONFECTIONERY (LONDON) COMPANY, LIMITED *v.* LONDON COMMERCIAL SALE ROOMS, LIMITED.

[1932. P. 3176.]

Landlord and tenant—Agreement—Covenant against assignment without licence—Licence not to be unreasonably withheld—Consent withheld on ground of apprehended detriment to the property.

The assignee of the benefit of two agreements under which two tobacconist's shops, forming part of a large block of buildings used as business premises, were respectively let to the assignor for terms of fourteen years, applied to the landlord for a licence to assign one of the shops to a respectable tenant. Each of the agreements contained a covenant by the tenant to use the premises as a tobacconist's shop only and not to assign the premises without the previous consent in writing of the landlord. The landlord refused to grant the licence in the belief that the occupation of the two shops by separate tenants would be detrimental to the property :—

Held, that the landlord's consent had not been unreasonably withheld.

Bates v. *Donaldson* [1896] 2 Q. B. 241 and *Houlder Brothers & Co.* v. *Gibbs* [1925] Ch. 575 applied.

WITNESS ACTION.

The following statement of the facts is substantially taken from his Lordship's judgment :

The defendants in this action are the freeholders of a large building in the City of London known as The London Commercial Sale Rooms. This building has a frontage on its west side to Mincing Lane, and on its east side to Mark Lane. A passage or corridor runs right through the ground floor of the building from east to west, and forms a connecting link between Mark Lane and Mincing Lane. This corridor is 270 feet long. The greater part of the ground floor space of the defendants' building is occupied by what are called the Subscription Rooms, Reading Room and Subscribers' Dining Room used by members of an Association known as The London Commercial Sale Rooms and their friends, the Subscription Rooms being used for transacting business in produce. There are also on the ground floor offices and shops, an office used by a travel agency, a post office and a safe deposit. The upper floors of the building are in part let off by the defendants for use as offices and in part consist of rooms used for the sale of produce by public auction. The building is used almost entirely by persons engaged or interested in the business of buying and selling produce. There is an agreed plan which shows how the space on the ground floor of the building is used. In the basement of the building is a public restaurant.

By an agreement for a lease dated July 26, 1927, and made between the defendants by their agent, William James Feare, of the one part and Abraham Singer of the other part, the defendants agreed to let and Abraham Singer to take a shop on the ground floor of the defendants' building for a term of fourteen years from September 29, 1927. This shop is known as No. 24 Mark Lane, and has a frontage to and an entrance from Mark Lane and also a frontage to and entrance from the corridor before referred to. The rent reserved by this agreement was 250*l.* per annum for the first three years of the said term, 300*l.* per annum for the following four years, and 350*l.* per annum for the remaining seven years. It was provided by this agreement that the lease to be granted pursuant thereto should contain (inter alia) covenants by the tenant to use the said premises as a tobacconist's shop only, and not to assign, underlet or part with possession of the said premises or any part thereof without the previous consent in writing of the defendants. Singer entered into possession of the shop under this agreement, and on September 14, 1928, a second agreement for lease was entered into by the defendants and Singer. By this agreement the defendants agreed to let and Singer to take a room also on the ground floor of the defendants' building fronting on the said corridor for a term of fourteen years from December 25, 1928, determinable at the expiration of the first seven years of the term by either party giving to the other six calendar months' previous notice in writing. The rent reserved by this agreement was 75*l.* per annum. It was also provided by this agreement that the lease to be granted thereunder should contain (inter alia) covenants by the tenant to use the said premises as a tobacconist's shop only, and also not to assign, underlet or part with the possession of the said premises or any part thereof without the previous consent in writing of the defendants. The room agreed to be let by this agreement was known, and has been referred to in these proceedings, as the kiosk. It has a frontage to the corridor, and is quite close to the Mincing Lane entrance thereof. By a deed dated October 15, 1929, and made between the defendants of the one part and the said Abraham Singer of the other part the last mentioned agreement for a lease was varied by cancelling the provision determining the term of fourteen years thereby agreed to be granted at the end of the first seven years thereof, and the rent thereby reserved was increased to the sum of 100*l.* per annum during the last seven years of the said term, and it was provided that the said agreement should continue in full force save as modified by the said deed and should thenceforth operate as though the term of fourteen years certain had originally been mentioned therein.

On November 4, 1929, Abraham Singer assigned to the plaintiffs the benefit of the two agreements of July 26, 1927, and September 14, 1928, as varied by the deed of October 15, 1929. This assignment was made with the written consent of the defendants, and the shop and the kiosk are now vested in the plaintiffs upon the terms of the said agreements and deed. The plaintiffs went into voluntary liquidation on June 14, 1932, the liquidation being a creditors' liquidation.

In the month of September, 1932, the plaintiffs, through their liquidator, agreed to assign the premises comprised in the agreement of September 14, 1928, to a Mrs. Regina Kramer, and on September 16, 1932, they applied by their solicitors to the defendants for a licence to assign the same to her. Subsequently Mrs. Kramer's references were supplied by the plaintiffs to the defendants. These were satisfactory.

After the matter had been fully considered by the directors of the defendant company, their solicitors on October 12, 1932, wrote to the plaintiffs' solicitors in the following terms: "Dear Sirs, London Commercial Sale Rooms, Ld., 30 Mincing Lane. Our clients, the London Commercial Sale Rooms, Ld., have handed to us the correspondence relating to the application made by the liquidator of Premier Confectionery Company (London), Ld., for a licence to assign the agreement for lease dated 14th September 1928 and deed of variation dated 15th October 1929 to Mrs. Regina Kramer. As you know, this tenancy is one of two tenancies of premises in the building owned by our clients, both of which were granted by them to the same person, namely, Mr. Abraham Singer, and subsequently assigned by him to the Premier Confectionery Company (London), Ld. You do not in your letters to our clients state what the liquidator proposes with regard to the other tenancy of the shop at the premises known as 24 Mark Lane. You will, however, appreciate, that our clients feel difficulty in granting a licence for the assignment of the premises comprised in the agreement for lease dated the 14th September 1928 without the premises comprised in the agreement for lease dated the 26th July, 1927. It is contrary to their policy that there should be different tenants of premises in their building carrying on the same trade in competition, and consequently they are unwilling to grant the licence as applied for in respect of the proposed assignment to Mrs. Kramer of the premises comprised in the agreement for lease dated the 14th September 1928 without the premises comprised in the agreement for lease dated the 26th July, 1927." [After reading further correspondence between the parties, showing that the defendants continued to refuse to grant the licence which the plaintiffs sought to obtain from them, his Lordship continued :] On December 19, 1932, the writ in the action was issued, the claim endorsed being as follows : " The plaintiffs claim (1.) A declaration that (*a*) the defendants are not entitled to impose as a term of giving consent to the assignment by the plaintiffs of the premises comprised in an agreement for lease dated the 14th September 1928 and made between the plaintiffs and Abraham Singer as varied by a deed dated the 15th October 1929 and made between the same parties a condition that other property not

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comprised in the said agreement as so varied is to be included in the assignment; (*b*) that the defendants have unreasonably withheld their consent to the assignment of the said premises by the plaintiffs to one Regina Kramer; (*c*) that in the events which have happened the plaintiffs are entitled to assign the said premises to the said Regina Kramer without any or any further consent on the part of the plaintiffs. (2.) Costs."

Fergus Morton K.C. and *J. G. Strangman* for the plaintiffs. If a landlord attaches an unreasonable condition to the granting of a licence the condition is bad: see *Young* v. *Ashley Gardens Properties, Ld.* (1)

No lessor is entitled to withhold his consent to an assignment unless (*a*) the proposed assignee is objectionable on personal or financial grounds, or (*b*) the proposed user of the premises is detrimental to the lessor in respect of these premises. *Houlder Brothers & Co.* v. *Gibbs* (2) is sufficient authority to determine this case. In the present case, as the premises can only be used for one purpose, it can hardly be open to the landlord to raise any objection to their being used for that purpose. The general principle is clearly stated in the judgment of the Master of the Rolls.

[They also referred to *Tredegar* (*Viscount*) v. *Harwood* (3) and *Premier Rinks, Ld.* v. *Amalgamated Cinematograph Theatres, Ld.* (4)]

R. F. Roxburgh K.C. and *Cyril J. Radcliffe* for the defendants. The form of the licence is to be found in *Young* v. *Ashley Gardens Properties, Ld.* (1) The defendants have acted reasonably in withholding the licence notwithstanding the observations in *Houlder Brothers & Co.* v. *Gibbs.* (2) The landlord is entitled to consider the user not only with reference to the demised premises but also with reference to its possible effect on his other premises and on the tenant. The defendants do not object to the carrying on of the business by the proposed sub-tenant as a tobacconist but to his carrying on the business of a tobacconist at the kiosk in competition with the business carried on at the shop.

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(1) [1903] 2 Ch. 112.

(2) [1925] Ch. 575, 583.

(3) [1929] A. C. 72.

(4) (1912) 56 Sol. J. 536.

[They also referred to *Governors of Bridewell Hospital* v. *Fawkner & Rogers* (1) and *Shanly* v. *Ward.* (2)]

Morton K.C. in reply.

Cur. adv. vult.

June 20. BENNETT J. [after stating the facts and the nature of the action, continued :] By virtue of s. 19, sub-s. 1, of the Landlord and Tenant Act, 1927, the agreement for the lease of the kiosk of September 14, 1928, is to have effect as if the parties had agreed that in the lease to be granted pursuant thereto the covenant to be contained therein, by the tenant, not to assign or underlet or part with the possession of the premises or any part thereof without the previous consent in writing of the defendants, was subject to the provision that such consent is not to be unreasonably withheld.

The plaintiffs' case is that in refusing their consent to the assignment of the kiosk on the grounds stated in the letters written on their behalf in the correspondence I have read, the defendants are unreasonably withholding their consent. The argument was that the defendants in withholding their consent have taken into consideration and acted upon matters which as a matter of law they have no right either to consider or act upon. The proposition of law upon which the plaintiffs rested their case was stated in these terms : " No lessor is entitled to withhold his consent to assignment unless (*a*) The proposed assignee is objectionable for some personal or financial reason, or (*b*) The proposed user of the premises to be assigned is detrimental to the lessor in respect of the same premises." They contended, and I think rightly, that no objection could be taken to Mrs. Kramer for personal or financial reasons, and they argued that as in the present case the premises to be assigned can only be used for one purpose —namely, as a tobacconist's shop, it was not open to the landlords to object to their use for that purpose. The authority for the proposition upon which they based their case was the decision of the Court of Appeal in *Houlder Brothers & Co.* v. *Gibbs.* (1)

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(1) (1892) 8 Times L. R. 637.

(2) (1913) 29 Times L. R. 714.

The facts of the present case are singular. The premises comprised in the agreement of September 14, 1928, are a very small part of a large building used almost entirely by persons of the male sex. The building is in a part of the City of London where there are not many shops, and the evidence given by Mr. Stanley, a surveyor of very great experience, and whose knowledge of the uses to which real property in the City of London can be put is probably unrivalled, was clear that the purposes for which the shops in the defendants' building could be used were very few. The district is one in which the male sex still predominates. The trades which can be carried on in the shops in the defendants' building are trades in articles which persons of the male sex need. Mr. Stanley made this fact perfectly plain, and his evidence on this point was not challenged.

There is also no question as to the good faith of the defendants. They withheld their consent to the assignment of the kiosk because in their belief a separation of the kiosk from the shop might be detrimental to the property they own and of which the kiosk and the shop both form a part, and for no other reason. They do not desire to get possession of the shop and kiosk or either of them before the end of the respective terms for which they are let. Their only wish is that the two shall continue to be held, as they have hitherto always been held, by one and the same tenant, because of their belief that their occupation by separate tenants is a bad thing for their property, particularly if the kiosk is used until December 25, 1942, for the sale of tobacco. It is true, of course, that Abraham Singer is bound to the defendants as the tenant of the shop until September 27, 1941, and that he can be compelled until that date to pay the rent reserved by the agreement of July 26, 1927. But it is clear from the evidence (*a*) that the rent of the shop is high, whilst the rent of the kiosk is low, and (*b*) that the kiosk takes a substantial part of the trade which before it was opened as a tobacconist's shop was done at the shop. It is beyond question, in my judgment, that any one trading in tobacco and cigarettes at the kiosk will always be a formidable competitor of any one carrying on the same trade at the shop. It is clear, in my judgment, that it is very unlikely that any one can be found who will take an assignment of the agreement for a lease of the shop if the kiosk is separately occupied by a tobacconist. Mr. Singer may, of course, be able to pay the rent of the shop for the residue of the term for which the defendants have agreed to grant him a lease; but, on the other hand, he may not, and I have no doubt, after hearing all the evidence, in concluding that if the shop were to come into the possession of the defendants during the continuance of the agreement relating to the kiosk the defendants would have the greatest difficulty in finding a tenant for it at anything approaching the rent which is now reserved.

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(1) [1925] Ch. 575.

If the defendants have in law the right to consider the possible effect upon their property of the shop and the kiosk being in the occupation of different tenants, I have no doubt that in withholding their consent to the assignment of the kiosk to Mrs. Kramer they did not act unreasonably. They acted as a reasonable man might have acted in the circumstances. The real question is whether as a matter of law the defendants, for the purpose of determining whether or not they would give their consent to the assignment, had the right to consider the effect upon their property, and in particular upon the shop which is a part of it, of the kiosk being occupied separately from the shop, and by a tenant bound to carry on there a trade which will compete with the trade for which the shop is best suited. In my judgment, they have.

In *Houlder Brothers & Co.* v. *Gibbs* (1) the Master of the Rolls, Warrington and Sargant L.JJ. all accepted and acted upon the reasoning of A. L. Smith L.J. in *Bates* v. *Donaldson*. (2) Sargant L.J. in particular proceeded upon the footing that the statement of A. L. Smith L.J. that the covenant in question in that case was inserted "in order to protect the lessor from having his premises used or occupied in an undesirable way, or by an undesirable tenant or assignee," was a statement which shows the limits which are to be put upon such a clause as the clause in question. If a reasonable man might think that the proposed user of the premises, or the proposed occupation of the premises will be undesirable, then, in my judgment, it is within the right of the landlord to withhold his consent to an assignment which will result in that undesirable use or occupation. The defendants in this case have withheld their consent because they in good faith think that in all the circumstances the occupation of the kiosk by Mrs. Kramer is undesirable.

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(1) [1925] Ch. 575.

(2) [1896] 2 Q. B. 241.

Mr. Morton for the plaintiffs contended that the defendants are really seeking to consolidate the two agreements, and that if they had intended that the shop and the kiosk should always be in the occupation of one tenant they should have inserted a stipulation to that effect in the agreement of September 14, 1928. The argument (if I followed it rightly) was that it was not reasonable for a landlord to withhold his consent to a proposed assignment if the subject-matter with regard to which the proposed assignment was objected to might have been made the subject-matter of an express stipulation at the time the tenancy was created. In my judgment, this is not the law. It is, in my opinion, clear from the judgments delivered by the members of the Court of Appeal in *Bates* v. *Donaldson* (1) and in *Houlder Brothers & Co.* v. *Gibbs* (2) that a landlord may withhold his consent to an assignment because he objects to the use the proposed assignee intends to make of the premises proposed to be assigned, although that use is not forbidden by the terms of the tenancy or by any rule of law.

I decide this case in favour of the defendants for the following reasons: (*a*) Because the proposed assignment will result in the kiosk being occupied separately from the

(1) [1896] 2 Q. B. 241. (2) [1925] Ch. 575.

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shop; (*b*) Because that is a matter which the defendants are entitled to consider in determining whether or not they will give their consent; (*c*) Because the defendants believe that the separation of the kiosk from the shop may injuriously affect their property; and (*d*) Because that opinion is one which may be entertained by reasonable persons and is not wholly unreasonable.

Accordingly, I dismiss the action with costs.

Solicitors: *Zeffertt & Heard; Coward, Chance & Co.*

J. L. D.

CLAUSON J.
1933
May 18.

In re GATES.

ARNOLD *v.* GATES.

[1925. G. 895.]

Solicitor—Taxation—Profit Costs—Solicitor-trustee—Action for Administration by Solicitor-trustee against Co-trustee—Employment by Solicitor-trustee of his own Firm.

In the absence of an express power in the instrument creating the trust for a solicitor-trustee to charge, a solicitor-trustee who employs the firm of solicitors of which he is himself a partner to act for him in the conduct of an action to administer the trust estate, is in no better position than a solicitor-trustee who acts as his own solicitor, and, on taxation of his costs, will not be allowed profit costs, even though there be an agreement that the solicitor-trustee shall have no share in profit costs.

SUMMONS to vary Taxing Master's certificate.

John Benjamin Gates, who died on December 19, 1925, by his will appointed his son Geoffrey B. Gates sole executor and trustee thereof.

On December 3, 1926, Montie Phillip Arnold was appointed to be a trustee with Geoffrey B. Gates of one-fourth share of the residuary estate of the testator which was settled by his will in trust for the testator's son, John Stanley Gates, and his children.

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GATES, *In re.*
ARNOLD *v.* GATES.

On April 26, 1927, Montie Phillip Arnold took out an originating summons, to which his said co-trustee was made a defendant, for account and administration of the testator's estate, and on June 12, 1928, an order by consent was made for the distribution of the testator's assets which then remained undistributed, and it was referred to the Taxing Master to tax, as between solicitor and client, the costs of the plaintiff and of the defendant and of the parties attending of the action, and it was ordered that the costs when taxed should be paid or retained out of the testator's estate.

The will of the testator conferred no power on a solicitor-trustee to charge for business transacted by him or his firm in relation to the trust estate.

In due course, the plaintiff, Montie P. Arnold, left with the Master for taxation his bill of costs, which was described as "the plaintiff's bill of costs," though in fact the work in connection with the action was throughout performed by the firm of Messrs. Hicks, Arnold & Bender, of which firm the plaintiff was a partner. The Taxing Master allowed the plaintiff "out of pocket expenses"; but, in the absence of an express power for a solicitor-trustee to charge, disallowed all profit costs.

On December 31, 1932, the plaintiff lodged his objections to the disallowance by the Master which, so far as they are material for the purpose of this report, were as follows: "(1.) According to the practice of the plaintiff's firm, where a member has been appointed and acted as a trustee and there is no solicitor costs clause in the instrument creating the trust, the whole of the costs incurred as a result of the member so acting go to the non-trustee members of the firm, and a retrospective agreement to this effect would, in that case, be entered into between the trustee-member and the non-trustee-members.

(2.) The plaintiff's firm is entitled to the whole of the profit-charges on the ground that a written agreement barring the plaintiff from participating in the profits of the bill of costs can now be entered into and the same, under the circumstances referred to in paragraph (1.), will in fact be retrospective."

The Master's answers to the plaintiff's objections were as follows: "The general rule is that a solicitor-trustee acting for himself alone cannot charge profit costs in the absence of a clause in the instrument creating the trust to do so. It has been held that a solicitor-trustee may employ his partner to act for him, if there is an express agreement that the trustee-partner does not share in the profits, and I take that to mean an agreement in writing. In this case there is no such express agreement as to the profits, and the solicitor-trustee himself had the conduct of the business and not his partners. It is suggested that an agreement can now be entered into and made retrospective, but in the absence of authority I cannot agree with that suggestion. The question whether the decision in *In re Doody* (1) which is the case of a solicitor-mortgagee acting by his firm, and where his partner was allowed his share of the profit costs, applies equally to a solicitor-trustee has not been decided. For these reasons I have disallowed all profit costs, and I overrule those objections."

The plaintiff by this summons, which was taken out by him through his solicitors, Messrs. Hicks, Arnold & Bender, asked that his objections might be allowed and that the matter might be referred back to the Taxing Master to vary his certificate accordingly.

Horace Freeman for the plaintiff. It is plain that had Mr. Arnold employed one or both of his partners in his firm to act for him in the action, such partner or partners would have been entitled to profit costs: *Clack* v. *Carlon* (2), where it was decided that a solicitor-trustee might employ one of his partners who would be entitled to the profit costs, provided it had been expressly arranged between them that the solicitor-trustee should not participate in those profit costs or derive any benefit from them. Here, as in that case, according to the arrangement made, Mr. Arnold was excluded from participating in the profit costs. True it is he employed his own firm to act for him, and that they did act for him in the action, but it is submitted that in view of that arrangement (notwithstanding it was not in writing) the course which he took is not, on principle, sufficient to differentiate this case from *Clack* v. *Carlon.* (1) In *In re Doody* (2), which was the case of a mortgagee-solicitor, Stirling J. said: "If the partners enter into an agreement that the mortgagee solicitor is not to share in the profits arising from the transaction, I should feel free to hold that the usual costs were to be allowed in full: in the absence of such an agreement it does not seem clear that this ought to be done."

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(1) [1893] 1 Ch. 129.

(2) (1861) 30 L. J. (Ch.) 639.

Leslie F. Mumford for Geoffrey Gates, the respondent to the summons. The plaintiff, by employing his own firm of which he was himself a partner, was in the same position as if he had acted as his own solicitor, in which case his duties and his interest might come into conflict: accordingly, he cannot be allowed profit costs: *Broughton* v. *Broughton* (3), cited by Stirling J. in *In re Doody* (2) at pp. 133 and 134 and dictum of the same judge at p. 134, and *Christophers* v. *White.* (4)

CLAUSON J. The plaintiff in the action, Mr. Montie Phillip Arnold, is a trustee with the defendant, Geoffrey Gates, of a one-quarter share of the residuary estate which was settled by the will of the testator in trust for his son, John Stanley Gates, and his children, Geoffrey Gates, another son, having been appointed by the will sole executor and trustee of the estate generally; and it was in his capacity of trustee of that quarter share that the plaintiff brought this action against his co-trustee for the administration of the estate of the testator, as a net result of which an order was made by me on December 7, 1931, for the division of the estate in accordance with a scheme which I approved on behalf of certain infants. It was one of the terms contained in that order that some costs, including the plaintiff's costs, should be taxed and paid or retained out of the estate generally.

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(1) 30 L. J. (Ch.) 639.
(2) [1893] 1 Ch. 129, 136.
(3) (1855) 5 D. M. & G. 160.
(4) (1847) 10 Beav. 523.

The plaintiff, who is a member of the firm of Messrs. Hicks, Arnold & Bender, brought in his bill of costs for taxation, described as "the plaintiff's" bill of costs, the name of his firm—namely, Messrs. Hicks, Arnold & Bender—being indorsed on the back of the bill, that firm having in fact acted throughout the legal proceedings for Mr. Arnold, the plaintiff in the action. The Master on taxation of the bill disallowed profit costs; but, before dealing in any detail with the plaintiff's objections to such disallowance and with the reasons given by the Master for overruling those objections, let me first of all deal with the matter generally.

The objection against allowing the plaintiff profit costs is—stating it generally—that, in the absence from this will of any express power for a solicitor-trustee to charge, the plaintiff, by employing the firm of solicitors, of which he was himself one of the partners, to act for him in the conduct of the action (which firm did so act), was in effect acting as his own solicitor.

It is true there is authority for saying that if a litigant, being a solicitor-trustee, is in partnership with other solicitors, he may employ those partners to act for him as his solicitors, provided arrangements are made that none of the profit costs which those partners make find their way into his own pocket. In *In re Doody* (1), which was a case of a solicitor-mortgagee, Stirling J., after quoting a passage from the judgment of Lord Cranworth in *Broughton* v. *Broughton* (2), which is as follows: "The result therefore is, that no person in whom fiduciary duties are vested shall make a profit of them by employing himself, because in doing this he cannot perform one part of his trust, namely, that of seeing that no improper charges are made. The general rule applies to a solicitor acting as a trustee." continued as follows (3): "It therefore follows that, as a general rule, neither a solicitor trustee nor a firm of which the trustee is a member can receive out of the trust estate profit costs by way of remuneration for transacting legal business in connection with the trust. To this general rule there are some exceptions, to one of which I may refer at once. It was decided by Lord Hatherley when Vice-Chancellor, in *Clack* v. *Carlon* (1), that a solicitor trustee may employ his partner to act as solicitor for himself and his co-trustees with reference to the trust affairs, and may pay him the usual charges, provided that it has been expressly agreed between himself and his partner that he himself shall not participate in the profits or derive any benefit from the charges. Nothing short of this will be sufficient. In particular it was decided in *Christophers* v. *White* (2), that the general rule applies, although all the business has been transacted by the partners of the solicitor trustee, and not by the trustee himself." Accordingly, if the plaintiff had employed other members of the firm to act as his solicitors, I should have felt justified for the reasons expressed by Stirling J. in allowing his partners to take the profit costs. The difficulty is that the plaintiff here did not take that course. Instead of doing so, he employed and acted by his firm; and, in so acting, he, being one of the three partners in the firm, was acting as solicitor on his own behalf in transacting legal business connected with the trust, notwithstanding the fact that there were two other partners, not trustees, associated with him in the transaction. There appears to be no authority for saying that a solicitor-trustee who has two partners, and whose firm acts as solicitors for him, is in any better position than a solicitor-trustee who, carrying on business alone and not in partnership, acts as his own solicitor in the matter of his trust. In such a case it appears to me plain that he could not be allowed to charge profit costs, and I do not see how, in the circumstances of the case with which I have to deal, profit costs can be allowed.

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(1) [1893] 1 Ch. 129.

(2) 5 D. M. & G. 160, 164.

(3) [1893] 1 Ch. 134.

I must now go back to deal with the circumstances of this case in order that the matter may be properly dealt with. As to the objections, what happened was this: when the bill came before him, the Taxing Master wrote across it in red ink, "Allow out of pockets only," and accordingly disallowed all profit costs. The objections to the disallowance of those costs were in these terms. [His Lordship read the objections put forward by the plaintiff as already stated in this report, and continued :] I am not clear what those objections exactly mean, but I take them to mean that it has been the practice of the plaintiff's firm to arrange that in cases where one of the partners happened to be a trustee, and there was no power in the instrument of trust for a solicitor-trustee to charge, the profit costs should be taken by the non-trustee members of the firm. But that does not get over the difficulty : the fact is that, in that statement of the firm's practice, it is assumed that the firm are employed to act as the solicitors to the solicitor-trustee. The Master overruled the objection on the ground that there was no express agreement in writing to exclude the plaintiff from sharing in the profit costs, and he accordingly refused to give effect to such an agreement unless it was in writing. In upholding the Master's decision I am not upholding it for the reason he stated, because the real difficulty in the case which I feel is one that would not be dissipated even if there were such an express agreement between the three partners. It would be dissipated if I were satisfied that, instead of the firm having been employed as solicitors, the plaintiff's partners had been so employed and acted in that capacity ; with, of course, proper safeguards against any portion of the profit costs coming into the hands of the solicitor-trustee ; but I am told that it cannot be said with truth that that was the case.

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(1) 30 L. J. (Ch.) 639.

(2) 10 Beav. 523.

I have entered upon this explanation in order that there may be no question as to the grounds upon which I decide this case. The result is that the objections must be overruled on the grounds which I have stated and, accordingly, in the result I hold that the Master was right in disallowing the profit charges, and I must dismiss the summons.

Solicitors : *Hicks, Arnold & Bender ; W. Silverwood Cope & Son.*

H. C. H.

FARWELL J.

1933

June 21.

In re COLLINGS.

JONES *v.* COLLINGS.

[1933. C. 1097.]

Will—Construction—"Money"—Money on Deposit Account at a Bank.

The word "money" when used in its strict legal sense in a will includes money on deposit account at a bank.

Manning v. *Purcell* (1855) 7 D. M. & G. 55 followed.

Observations on judicial definitions of "money."

ADJOURNED SUMMONS.

This summons raised the question whether money on deposit account at a bank was "money" within the strict legal sense.

By her will dated September 1, 1931, the testatrix, having appointed the plaintiff her sole executor, left all she possessed to be divided between her brother Montague and her sisters the defendants, Alice Mabel Collings and Evelyn Ethel Balls, subject to certain legacies. The will then proceeded: "all my money left to brother and sisters unused at their death is to go to a good lifeboat society." The testatrix died on September 8, 1932, her brother Montague having predeceased her. At the date of her death the testatrix was possessed (inter alia) of certain stocks, 11*l.* in cash in her house, 1240*l.* 7*s.* 1*d.* on drawing account and 2092*l.* 0*s.* 2*d.* on deposit account at her bank. His Lordship held that the word "money" meant money in the strict legal sense. The question then arose whether Montague's one-third share of the money on deposit account at the bank passed under the gift to a lifeboat society or whether it fell into residue.

W. T. Elverston for plaintiff.

H. O. Danckwerts for the Attorney-General. Deposit accounts at a bank are included in the word "money," even when the word is used in its strict legal sense.

Manning v. *Purcell* (1) is an authority on the precise point in the present case. The gift in that case was of "all my moneys" and it was held by the Court of Appeal that money secured by deposit notes bearing interest passed under the gift. That case was followed by Younger J. in *In re Glendinning*. (2) The present case is governed by *Manning* v. *Purcell*. (1)

J. Leonard Stone for the residuary legatees. The word "money" in its strict legal sense means ready money and that cannot mean money on deposit, which cannot be withdrawn without giving notice. *Manning* v. *Purcell* (1) is distinguishable, because the word "unused" is here employed in conjunction with the word "money." It is also to be noted that in that case Knight Bruce L.J. (3) and Turner L.J. (4) affirmed the decision of Stuart V.-C. (5) on this point with reluctance. In *In re Glendinning* (2) the gift was of "all my moneys in the bank" and it is therefore not the same case as the present one. In *In re Wheeler* (6) it was held that money on deposit at a bank withdrawable at fourteen days' notice was not ready money, and Farwell J. said in *In re Price* (7) that he was of opinion that if money on deposit was subject to more than twenty-four hours' notice of withdrawal it was not "ready money." Although the point in this case was not raised or argued in *In re Taylor* (8), both Warrington L.J. and Younger L.J. (9) laid down definitions as to what "money" means and they did not include money on deposit account.

FARWELL J. The last question to be determined on this will is one which, having regard to the state of the authorities, is not free from doubt. The testatrix directed that "all my money left to brother and sisters unused at their death is to go to a good lifeboat society." I have already held that "money" in this case means money in the strict sense.

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(1) 7 D. M. & G. 55.
(2) (1918) 120 L. T. 222.
(3) 7 D. M. & G. 55, 64–5.
(4) Ibid. 55, 67.
(5) (1854) 2 Sm. & G. 284.
(6) [1904] 2 Ch. 66.
(7) [1905] 2 Ch. 55, 56.
(8) [1923] 1 Ch. 99.
(9) Ibid. 99, 108, 110.

The question I now have to determine is whether "money" in this will includes money on deposit. It is conceded that the term "money" in its strict sense must include cash in hand and money on drawing account at the bank, but it is said that money which is on deposit at the bank is not properly "money" at all, because it is not immediately available. The testatrix could only have obtained it by giving notice to the bank, and until she had given such notice and that notice had expired, the money would not be available for use.

I must now consider the authorities upon this point, which seem to be not altogether easy to reconcile. In *Manning* v. *Purcell* (1), one of the questions which had to be determined was the meaning of a bequest of "all my moneys." There the testator had two balances standing to his credit at his bank, one an ordinary current account and the other secured by deposit notes bearing interest. The question which was debated and decided in that case was whether or not the term "all my moneys" included both the ordinary current account and the deposit account. When the matter came before Stuart V.-C. (2) he decided that both the accounts passed under the bequest of "all my moneys." There was an appeal to the Court of Appeal on this question, and both the Lords Justices seem to have had some little doubt. Knight Bruce L.J. says (3): "With regard to the balance standing to the testator's credit at his bankers, which did not bear interest, that balance as well as the money in his house at the time of his death must unquestionably be considered as passing under the term 'moneys.' I have some doubt as to the other portion of the balance at his bankers, inasmuch as it could not be dealt with by ordinary cheques, but would have required some notice: my doubt, however, is not so strong as to justify me in dissenting from what the Vice-Chancellor has decided in this respect. It is only a doubt, and I cannot act against his judgment upon a doubt." The result of that is that Knight Bruce L.J. affirmed the view taken by Stuart V.-C. (2) When Turner L.J.

(1) 7 D. M. & G. 55. (2) 2 Sm. & G. 284. (3) 7 D. M. & G. 55, 64–5.

dealt with this point, he said (1): "The next question is, as to the general balance standing to the testator's credit on a general current account at his bankers. I think this must be considered as the testator's moneys at his death. Looking at the ordinary language and usage of mankind, when a man says, 'I have so much money at my bankers,' he considers and treats it as his money; and when he speaks of all his money, he includes the balance at his bankers. No doubt it is properly only a debt due from the bankers, but the ordinary usage of mankind treats it as money. There is then this further question. There was at the testator's death a sum standing to his credit upon a deposit account with his bankers, for which he had taken a deposit note bearing interest. Upon this I have felt considerable doubt; but, I think, that that also must be considered as 'moneys' of the testator, within the meaning of the will. The substance of the case is, that the testator had two distinct accounts at his bankers, the one a current account, and the other an account which he treated as a reserve fund, but which was not, therefore, the less his monies." It is to be noted that in that case the testator had not given "all my moneys at my bankers"; he gave "all my moneys," and the Court of Appeal in that case, affirming the Vice-Chancellor, decided that the term "all my moneys" is wide enough to and does include not only money on current account but moneys standing to a deposit account.

That decision was considered by Younger J. in *In re Glendinning* (2); but the question which the learned judge had to determine in that case was not quite the same as that which I have to determine, because the gift was "all my moneys in the bank." It seems to me that those words may possibly have a different meaning from the words "all my moneys" and that the use of such words may render it easier to come to the conclusion that a gift of "all my moneys at the bank" includes money on deposit as well as on current account than where the only gift is of "all my money." Younger J. in deciding that question referred

(1) 7 D. M. & G. 55, 67.

(2) 120 L. T. 222.

to the case of *Manning* v. *Purcell* (1), and he quotes the passage from the judgment of Turner L.J. which I have just read. He then says (2): "Whether in that case notice was expressed to be necessary to withdraw the money on deposit is not clear, and upon the whole reading of the report it may be that it was not; for Knight Bruce L.J. had some doubt about the deposit money passing, because he thought it could not be dealt with by ordinary cheques, but would require some notice, but, nevertheless, his doubt was not so strong as to justify him in dissenting from the judgment appealed from. I prefer to treat the matter as one of substance, as Turner L.J. did; I do so all the more readily because of the fact that notice in the case of such accounts is now notoriously a formality rarely if ever in practice insisted upon. Accordingly I hold that the deposit money here was included in the testator's 'moneys at the bank' and passed accordingly." The importance of that judgment for my purpose is this, that Younger J. treats Turner L.J. as having decided in terms that the gift of "all my moneys" includes money on deposit.

There have been decisions to which my attention has been called as to the meaning of the words "ready money," and Farwell J., in *In re Price* (3), held that ready moneys did not pass money on deposit at a bank. That, I think, is a different case from the one I have to consider, because the term "ready money" may have a different meaning from "money" alone, and for this reason these cases as to the meaning of "ready money" really do not assist me, although Mr. Stone made a gallant attempt to bring this case within those decisions by having recourse to the word "unused," which the lady had used in her will. I cannot, however, see that "all my money unused at their death" is any the less applicable to money which, at the death of the lady herself, was on deposit than to money on current account. It seems to me no help can be derived from the use of the word "unused" in this case.

(1) 7 D. M. & G. 55.

(2) 120 L. T. 223.

(3) [1905] 2 Ch. 55.

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In those circumstances the position would seem to be that there is a decision of the Court of Appeal in *Manning* v. *Purcell* (1), which, on the face of it, appears to determine that the word "moneys" includes money on deposit at the bank; but there is a much more recent decision of the Court of Appeal which has given me some difficulty, and to which I must refer. That is the decision in *In re Taylor*. (2) In that case the question was as to the meaning of the gift in the will of "The money I have and am entitled to now and at any future time," and then another gift of "the remaining two-thirds of my money, including the money I have now and that which I am entitled to now or at any future time." It appears the testatrix possessed at the time of her death stock, shares and securities to the value of 16,000*l.*; cash in the house and an uncashed money order for a total of 8*l.* 9*s.* 2*d.*; 821*l.* cash at the West Brighton branch and further moneys at the London branch of the London County Westminster and Parr's Bank, both accounts, I understand from the report, being on current account; a sum of money in the hands of some solicitors and 1000*l.* lent on mortgage. The question was what passed under the term "money." The Court of Appeal, varying the decision of Peterson J. (3), came to the conclusion that there was nothing in the context in the will in that case which enabled the Court to put any meaning on the word "money" other than its strict meaning, and that accordingly only that passed under the gift of money which was strictly money. So far as I can see from reading the report, no question as to the distinction between money on deposit and money on current account was argued, nor did it arise for decision in that case, for I can find no suggestion that there was in that case money on deposit; but there are undoubtedly passages in the judgments of two of the learned Lords Justices which would seem to indicate that in their view money on deposit account cannot be included in the phrase "money" when it is used strictly.

(1) 7 D. M. & G. 55.

(2) [1923] 1 Ch. 99.

(3) [1922] 1 Ch. 569.

I do not think there is anything to be found in the judgment of the Master of the Rolls on this particular point which assists me. He came to the conclusion that the word " money " used in the will meant money in its strict sense, but I do not think he says in terms what the word " money " means in its strict sense. Warrington L.J., however, makes a statement in these terms (1): " Now the only principle established by the authorities is, I think, correctly stated by the learned judge in the following words: ' Money is to be treated in the strict sense unless there be a context which shows something to the contrary.' " That is the end of the quotation from Peterson J.'s judgment. Then the Lord Justice goes on: " ' Money in the strict sense ' means, as I understand, money actually in hand as cash, or at the bank on drawing account, and certainly does not include such items of property as in this case have been held to pass." Younger L.J. says (2): " In other respects the principles to be applied are not in debate. There is a legal sense, which in the absence of a context is the sense that must be attributed to the word ' money ' when used in a will. In its strict legal sense the word is confined to ready money actually in hand. The popular sense of the word is quite different. A gift by a testatrix of her money or of all her money would, in popular language, be the equivalent of a gift of her fortune—of her ' brass,' to use a North-country phrase—of her whole personal estate, perhaps even of her entire property, real and personal, to use more technical terms." If I am to treat those statements as deciding that the word " money " in its strict tense is to be confined to ready money, it would seem on she other authorities to which I have already referred that it would not include money on deposit. Further, Warrington L.J. in stating what is included in the word " money " in its strict sense does say it includes money in hand as cash, or at a bank on drawing account, and he would appear to be drawing a distinction between money on deposit and money on current account. That being so, I am in this difficulty, that on the one hand I have a decision of the

(1) [1923] 1 Ch. 99, 108.

(2) Ibid. 110.

Court of Appeal in *Manning* v. *Purcell* (1), which seems to me to decide that money, even in its strict sense, includes money on deposit at the bank, and I have in *In re Taylor* (2) expressions of opinion by two of the learned Lords Justices which I think clearly indicate the contrary view; but in *In re Taylor* (2), as I have already said, I cannot find that the question as to whether or not money on deposit at the bank passed under the term "moneys," was a matter which had to be determined by the Court. It does not seem to me to have been argued, nor does it seem to have been a question which it was necessary for the Court to decide. I cannot find that the decision of *Manning* v. *Purcell* (1) was referred to in any way, nor do I think their Lordships' attention was drawn particularly to this question as to the distinction between money on deposit and money on current account. In those circumstances it seems to me that I am bound by the earlier decision of the Court of Appeal, which I think goes to decide that where there is a gift of moneys, even used in its strict sense, the term includes moneys not only on current account at the bankers, but also money on deposit. To what conclusion I should have come if the matter had been open to me, it is unnecessary to consider. If the decision in *Manning* v. *Purcell* (1) is a decision on the point, as I think it is, it seems to me that I am bound to follow it. I do not think, notwithstanding the sentences I have read from the judgment of the learned Lords Justices in *In re Taylor* (2), that I should be justified in disregarding the earlier decision, which was an exact decision on the point, and a point which does not seem to me to have arisen in the Court of Appeal in the later case. In those circumstances I hold that the gift of moneys here includes the substantial sum which was on deposit account at the lady's bankers at the time of her death.

Solicitors: *Nordon, Hugh-Jones & Flinn, for Whittey, Denton & Pawsey, Colchester; The Treasury Solicitor.*

(1) 7 D. M. & G. 55.

(2) [1923] 1 Ch. 99.

P. J. B.

FARWELL J.

1933

July 11.

In re CARR'S SETTLEMENT.

RIDDELL *v.* CARR.

[1933. C. 2042.]

Settlement—Construction—Two Annuities of 150*l. each charged on Leasehold Properties—Annuities redeemed on Application of the Owners of the Properties, under s.* 191 *of the Law of Property Act,* 1925*—Produce of Sale invested in War Loan—Income from Fund not sufficient to meet Annuities—Position as between Tenants for Life and Remaindermen—Law of Property Act,* 1925 (15 *Geo.* 5, *c.* 20), *s.* 191, *sub-ss.* 1, 2, 3, 4.

By a settlement, dated August 23, 1892, two annuities of 150*l.* each, charged on certain leasehold properties, were given to H. S. C. for life and after her death to her husband, H. L. C., for his life and after the death of the survivor of them, to their three daughters during their lives, with remainder to their children. The settlement provided that the trustees might retain the annuities in their then state of investment, but if H. S. C. and H. L. C., or the survivor of them, should in writing require them to sell or if they, after the death of H. S. C. and H. L. C., in their discretion should sell the annuities, the money produced by the sale should be invested in the manner thereinafter authorized. H. S. C. and H. L. C. were both dead. The owners of the properties upon which the annuities were charged applied to the Minister of Agriculture and Fisheries, under s. 191 of the Law of Property Act, 1925, to have the annuities redeemed, and on January 16, 1933, the Minister certified that the annuities could be redeemed for the sums of 3346*l.* and 3279*l.* respectively. The trustees invested the moneys in the purchase of 6667*l.* 6*s.* 3*d.* War Loan, the yearly produce of which was insufficient to meet the two annuities of 150*l.*, less income tax. Doubts having arisen as to how the capital should be dealt with as between tenants for life and remaindermen, the trustees took out a summons asking how they should deal with the fund:—

Held, that the relative rights of the tenants for life and remaindermen remained in the same position as before the sale took place, and that the trustees should sell in each year sufficient of the capital to produce, together with the income, 300*l.* a year, less income tax, payable to the tenants for life.

ADJOURNED SUMMONS.

By an indenture of settlement, dated August 23, 1892, and made between Henry Lascelles Carr of the first part, his wife Helen Sarah Carr of the second part, Charles James Jackson of the third part, and the trustees of the fourth part, certain trusts were declared affecting property previously thereto vested in the trustees thereof in pursuance of an agreement in that behalf, including two annual rentcharges of 150*l.* each arising and granted by C. J. Jackson out of two leasehold properties situate in the city of Cardiff. The trusts, material to the present application, declared concerning the two rentcharges (which formed part of a fund in the settlement called "the second fund" and which were together in the settlement referred to as "the annuity") were as follows: ". . . . the trustees or trustee . . . . shall henceforth stand and be possessed of . . . . the annuity and shares specified in the second schedule hereto hereinafter called the second fund and the future payments of the yearly produce thereof . . . . upon the trusts and with and subject to the powers, provisions and declarations hereinafter expressed concerning the same. . . . ." "And as to the yearly produce of the second fund (the payments from time to time accruing of the said annuity of 300*l.*, which forms part of that fund, being while the same shall remain unconverted treated as yearly produce) the trustees or trustee shall pay so much thereof as shall accrue during the life of the said Helen Sarah Carr to her so as that the same shall, while she may be married, be for her separate use without power of anticipation." The settlement provided after the death of H. S. Carr for payment of the yearly produce of the second fund to H. L. Carr during his life and after the death of the survivor of them that the trustees should stand possessed of the yearly produce of the second fund as to one equal third part of so much thereof as should accrue during the life of the defendant Jenny Lascelles Carr in trust for her, with restraint upon alienation, and as to so much of another third part thereof as should accrue during the life of the defendant Ettie Lascelles Macdermot in trust for her, with a similar restraint, and as to so much of the remaining part thereof as should accrue during the life of the defendant Matty Lascelles Gilmore in trust for her, with a similar restraint. The settlement then provided that until the determination or failure of the trusts the trustees or trustee should stand and be possessed of and interested in the first and second funds and the yearly

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produce thereof respectively upon the trusts and with and subject to the powers and provisions thereinafter expressed concerning the same respectively. The settlement then dealt with the first fund, and it provided that, upon the failure of the trusts relating to the first fund, the second fund and the yearly produce thereof should be held upon such trusts as H. S. Carr should by deed, will or codicil appoint, and in default of such appointment as to one-third part thereof as the defendant J. L. Carr, as to one-third thereof as the defendant E. L. Macdermot and as to one-third thereof as the defendant M. L. Gilmore should respectively by will or codicil appoint and in default of and subject to any and every such appointment upon trust for such person or persons as under the statutes of the distribution of the effects of intestate persons would have become entitled to the second fund at the death of H. S. Carr if she had died a spinster possessed thereof intestate. The settlement then provided that: "The trustees or trustee may retain as well the said annuity of 300*l.* specified in the said second schedule hereto as all or any of the shares constituting the first fund and the residue of the second fund respectively in their present states of investment and while the last mentioned annuity shall remain unconverted the whole of the accruing payments thereof shall for the purposes of this settlement be treated as income but that if and when the said Henry Lascelles Carr and Helen Sarah Carr or the survivor of them shall in writing so require and after the decease of the survivor of them if and when the trustees or trustee shall in their or his uncontrolled discretion think it expedient so to do the trustees or trustee shall sell the annuity of 300*l.* specified in the second schedule hereto and shall invest the money produced by sale thereof in a manner hereinafter authorised."

H. L. Carr and H. S. Carr died leaving three daughters, the defendants J. L. Carr, E. L. Macdermot and M. L. Gilmore. Ruth Rosaleen Sarah Gilmore, daughter of M. L. Gilmore, was, by order, added as defendant to represent the class of persons interested in remainder to the capital of the funds, subject to the trusts of the settlement.

Upon an application to the Minister of Agriculture and Fisheries under s. 191 of the Law of Property Act, 1925 (1), by the owners of the two leasehold properties upon which the annual rentcharges of 150*l.* were respectively charged, the Minister on January 16, 1933, duly certified under his official seal as the sums by the payment of which redemption of the charges could be effected, the sums of 3346*l.* and 3279*l.* respectively. The trustees of the settlement duly invested the sum received in the purchase of 6667*l.* 6*s.* 3*d.* War Loan which was inscribed in their names. The income from that fund was insufficient to meet the annuities.

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(1) Sect. 191, sub-s. 1: "Where there is a rent being either (*a*) a quit rent, chief rent or other annual or periodical sum issuing out of land . . . . the Minister shall at any time, on the requisition of the owner of the land or of any person interested therein, certify the amount of money in consideration whereof the rent may be redeemed. Where the rent is not perpetual, the Minister may authorise the purchase of a Government annuity of an amount equal to the rent, payable during the residue of the period for which the rent would have been payable, in such names as he may think fit, and give directions as to the payment of the annuity, and the amount required to purchase that annuity shall be the redemption money."

Sub-s. 2: "Where the rent is perpetual and was reserved on a sale, or was made payable under a grant or licence for building purposes, the redemption money shall be such sum as would (according to the average price, at the date of redemption, of such Government securities as may for the time being be prescribed by the Treasury) purchase sufficient of such Government securities to yield annual dividends equal to the amount of the yearly rent redeemed."

Sub-s. 3: "Where the person entitled to the rent is absolutely entitled thereto in fee simple in possession, or is empowered to dispose thereof absolutely, or to give an absolute discharge for the capital value thereof, the owner of the land, or any person interested therein, may, after serving one month's notice on the person entitled to the rent, pay or tender to that person the amount certified by the Minister."

Sub-s. 4: "If the Minister is satisfied—(*a*) that any person who has been in receipt of a rent, or claims to be entitled thereto, is unable or unwilling to prove his title either to dispose thereof absolutely, or to give an absolute discharge for the capital value thereof, or neglects to apply to any competent body or person for any requisite order or consent; or (*b*) that a person entitled to the rent or any part thereof cannot be found or ascertained . . . . the Minister may authorise the owner or other person interested in the land affected by the rent to pay the amount of the redemption money certified by the Minister or the Government annuity into court, to an account entitled in the matter of the rent and of the land affected."

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Doubts having arisen as to how the capital sum should be dealt with as between the tenants for life and remaindermen, the present trustees of the settlement took out this summons asking whether upon the true construction of the settlement and in the events which had happened they should deal with the fund of 6667*l.* 6*s.* 3*d.* (*a*) by paying to the persons for the time being entitled to the trust funds only the income produced by the War Loan in each year; or (*b*) by selling in each year sufficient of the capital of the fund to produce for those persons in that year, together with the dividends accruing from the fund, the sum of 300*l.*, less income tax.

The Hon. C. Russell for plaintiffs.

L. W. Byrne for tenants for life. Where the trustees hold wasting property or a reversion they have a discretion to convert, unless there is a special condition in the settlement. The matter was discussed in *Rowlls* v. *Bebb.* (1) Here the trustees were given a discretion to convert, but they were to treat the produce as income until they exercised their discretion. They never exercised their discretion, and although the property has gone it must be treated as unconverted, and the rights of the beneficiaries must remain as if it were still unconverted.

Richmount for the remaindermen. The settlement does not say that the trustees themselves are to convert. Here there has been a conversion by statute, and the trustees can only pay to the tenants for life the yearly produce of the investment in which the money obtained by the conversion has been placed.

FARWELL J. This summons raises a curious point upon a settlement which was made on August 23, 1892; so far as I know it has not arisen before in this exact form in any reported case, and counsel have not been able to give me any authority which assists me in arriving at a conclusion. [His Lordship stated the facts and read the parts of the settlement set out above, and continued:] The annuities in

(1) [1900] 2 Ch. 107.

question have been realized, but neither with the consent nor at the request of Henry Lascelles Carr and Helen Sarah Carr, nor the survivor of them, nor at the uncontrolled discretion of the trustees. They have, in fact, been sold, because the owner of the leasehold properties desired to redeem the property from the charges, and took advantage of the provisions of s. 191 of the Law of Property Act, 1925, to effect that purpose. By that section it is provided: [His Lordship read s. 191, sub-ss. 1, 2, 3, 4, as set out above, and continued :] I cannot have any doubt myself that, on the true construction of that section, it enables a compulsory sale to be made. The owner of the land which is subject to the rentcharge can require the Minister to certify what the capital value of the rentcharge is, and the Minister having so certified the owner is entitled on proper notice to tender the amount so found to the owner of the rentcharge, and if that person refuses or neglects to accept the tender or cannot be found, then the Minister can authorize the money to be paid into Court, and on proof of such payment or tender, then the Minister certifies that the rent is redeemed under the Act, "and that certificate shall be final and conclusive, and the land shall be thereby absolutely freed and discharged from the rent" : s. 191, sub-s. 5.

The result of that is that the trustees in this case cannot be said to have exercised any discretion in the matter one way or the other. It is suggested that because they took the money when it was tendered to them they exercised their discretion, and that if they had wanted to indicate that they were not exercising their discretion they should have refused to take the money, and compelled the owner of the leaseholds to pay it into Court, and then, I suppose, they would have proceeded to take the money out. If they had taken that course, I think that it might well have been said that they had put the Trust Fund to an unnecessary expense for which they might be personally liable, and I cannot conceive that merely by accepting the tender instead of putting the owner of the leaseholds to the trouble and themselves to the expense of the payment into

Court, that they had exercised any discretion. So the position is this: the annuities have come to an end; a capital sum is in the hands of the trustees which represents the capital value of the annuities. The annuities were not sold either with the consent of the two tenants for life or the survivor of them or under the discretionary power given to the trustees.

What then is the position so far as the capital money is concerned? There is no provision in the settlement as to what is to happen if the annuities cease to exist for any such reason as in this case, and in my judgment the true view is this: the annuities must be treated as still subsisting so far as the relative rights of the tenants for life and remaindermen are concerned. The only way, in my judgment, in which their relative rights could have been altered under the settlement was either by a sale by the direction of the two tenants for life or the survivor of them or at the discretion of the trustees, or it may be under an order of the Court for the administration or the execution of the trusts; but in no other way is it possible for their respective rights to be altered. They remained the same so far as these annuities are concerned, and in my judgment the tenants for life are entitled, so far as it is possible, to remain in the same position *vis-à-vis* the remaindermen as they were before the sale took place. How is that to be effected? In my judgment, the right course to adopt is that which is suggested by para. 1 (*b*) of the originating summons. The trustees should sell in each year sufficient of the capital to produce, with the income, 300*l.* a year less income tax, and this annual sum is to be payable to the tenants for life.

Solicitors for all parties: *Smith, Rundell, Dods & Bockett.*

P. J. B.

GILFORD MOTOR COMPANY, LIMITED *v.* HORNE.

[1932. G. 1418.]

C. A.
1933
FARWELL J.
Feb. 28; *March* 1.
C. A.
April 27, 28.

Restraint of Trade—Agreement between Company and Managing Director—Covenant not to solicit Customers or Persons "in the habit of dealing with the company"—Reasonableness of Restriction.

The plaintiff company bought the various parts of motor vehicles from manufacturers, assembled the parts on the company's premises and sold the products under the name of Gilford Motor Vehicles. They also sold separate parts which were handed over to the buyers for cash. By an agreement dated May 30, 1929, the defendant was appointed managing director of the plaintiff company for a term of six years from September 1, 1928. Clause 9 of the agreement provided that: "The managing director shall not at any time while he shall hold the office of a managing director or afterwards solicit, interfere with or endeavour to entice away from the company any person, firm or company who at any time during or at the date of the determination of the employment of the managing director were customers of or in the habit of dealing with the company." The employment of the defendant as managing director was determined in November, 1931, by an agreement between the parties under which the defendant was to receive a fixed sum payable in instalments. Shortly afterwards the defendant opened a business for the sale of spare parts of Gilford vehicles. In an action by the plaintiff company to enforce the covenant:—

Held (by Farwell J.), that persons buying spare parts from the plaintiff company, paying for them in cash and taking them away, would be included in the covenant; that the defendant, as managing director, would not come into contact with those customers and would not know them or their names and addresses and that, therefore, the covenant was too wide.

Held, by the Court of Appeal (reversing the decision of Farwell J.), that in the circumstances the covenant was not wider than was reasonably necessary for the protection of the plaintiff company's trade and was therefore enforceable by injunction.

WITNESS ACTION.

In this action the plaintiffs asked for an injunction to restrain the defendant E. B. Horne, either directly or indirectly by means of the defendant company (called J. M. Horne & Co., Ld.) or otherwise, and to restrain the defendant company, from soliciting, interfering with or endeavouring to entice away from the plaintiffs any person, firm or company who at any time during or at the date of the determination of the employment of the defendant as managing director of the plaintiffs were customers of or in the habit of dealing with the plaintiffs, and to restrain the defendant Horne from directing or suggesting such solicitation, interference or endeavouring to entice away by the defendant company or any agent or servant thereof in breach of a covenant on the part of the defendant Horne contained in an agreement dated May 30, 1929, and made between the plaintiffs and Horne.

The facts are fully set out in the judgment of Farwell J.

Sir Herbert Cunliffe K.C. and *W. E. Vernon* for the plaintiffs. The covenant in clause 9 of the agreement is for the protection of the plaintiffs. It is not too wide considering that the plaintiffs' business is to supply Gilford motor vehicles and spare parts. The words, "or in the habit of dealing with the company," are mere surplusage and do not extend the scope of the restriction. The covenant is really one binding the defendant not to solicit the plaintiffs' customers, and should be enforced as such. In *Konski* v. *Peet* (1) it was held that the agreement there not to solicit customers could not be confined to persons who were customers during the employment, but extended to all persons who were customers at the date of the agreement or at any time after that date, and was therefore too wide. That case does not apply here.

Sir Walter Greaves-Lord K.C. and *H. J. Astell Burt* for the defendants. The covenant is too wide to be enforceable. The plaintiffs sell spare parts to strangers, who pay cash for and take the spare parts away with them. Any strangers who bought spare parts in this way several times would come within the meaning of persons "in the habit of dealing with the company." The defendant, as managing director, would not come into contact with customers of that class and would not know them, and might therefore quite innocently solicit their custom. That renders the prohibition unreasonable and makes the whole covenant bad. The tendency of the Courts is to be strict in their consideration of these restrictive covenants and to enforce only those which are formed for the protection of employers and are not unreasonable or too wide: *Attwood* v. *Lamont* (1); *Express Dairy Co.* v. *Jackson.* (2)

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(1) [1915] 1 Ch. 530.

C. A.
1933
Gilford Motor Co.
v.
Horne.

Farwell J. The plaintiffs in this action are a limited company, Gilford Motor Company, Ld., and they seek an injunction against the first defendant, Edward Bert Horne, to restrain him from " soliciting, interfering with, or endeavouring to entice away from the plaintiffs any person, firm or company who at any time during or at the date of the determination of the employment of the defendant Horne as managing director of the plaintiffs were customers of or in the habit of dealing with the plaintiffs "; and they seek against the defendant company, the second defendant, J. M. Horne & Co., Ld., a similar injunction, the case against the defendant company being really put on the ground that the defendant company is merely the creature of the first defendant, and the first defendant is committing breaches of the covenant by the agency of the defendant company.

The facts which give rise to this dispute are these. The plaintiff company is a public company which was incorporated in the year 1926, and its business is that of manufacturing a certain class of motor vehicle known as the Gilford motors. " Manufacturing " is not a very accurate term, because they only manufacture in the sense that they procure from other manufacturers the various necessary parts and then assemble those parts, so creating the motor in question. Some of the parts which are thus bought by the plaintiff company are what are known as standard parts, but other parts are parts which are made to the direction of the plaintiff company, especially for their particular class of car. In addition to the manufacture and sale of the Gilford motors, they also give to their customers what is known as service, which I understand means doing repairs to the motors which they sell, and in addition to that they sell spare parts. They have a catalogue which contains the various parts which they deal in, I think all of them parts which are required or used in the particular motor. The plaintiff company has not any shop in the sense of a place where there is a counter over which goods are sold, but they have a workshop into which persons desiring to buy parts can go, and where parts can be purchased for cash and taken away by the purchasers.

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(1) [1920] 3 K. B. 571.

(2) (1929) 46 Times L. R. 147.

The defendant Horne was from the incorporation of the company connected with it, and in the year 1929 he was appointed managing director under the terms of a written agreement dated May 30, 1929, and it is upon the covenants contained in that agreement that this action is brought. The agreement is not framed in the happiest of language, and it is necessary for me to refer to several parts of it. It is made between the plaintiff company of the one part and the first defendant of the other part, and by that agreement the defendant is appointed managing director to "perform the duties and exercise the powers which may from time to time be assigned to or vested in him by the directors of the company." By clause 2 it is provided: "The managing director shall hold the office for the term of six years as from the first day of September One thousand nine hundred and twenty-eight." I understand that the defendant had been acting as managing director from September 1, 1928, and that this agreement was intended to regularize his position as such managing director. By clause 3 it is provided that: "The managing director shall during the continuance of this agreement devote the whole of his time attention and abilities during the business hours of the company to the business of the company, and shall comply with the directions and regulations given and made by the directors of the company and shall well and faithfully serve the company and use his best endeavours to promote the interests thereof. The managing director shall not either before or after the termination of this agreement disclose to any person whomsoever any information relating to the business of the company." Now pausing there for one moment, it is, I think, reasonably plain that the word "agreement" used in that clause must mean his engagement as managing director, because, as will be seen later on and as in fact appears in this particular clause, the covenant not to disclose to any persons any information relating to this business is a covenant which can only come into operation after the determination of his engagement as managing director, but the agreement does not determine on that event happening, because by the very terms of it the covenant against disclosing is a covenant to come into operation at that date. Then there is a provision as to the holidays to which the managing director shall be entitled, and there is a provision for a salary of 1250*l.* a year, with further remuneration by way of commission. Then there is a provision in clause 6 that "If the managing director shall be guilty of any breach of his duties as such or shall refuse or neglect to carry out his duties as may be reasonably assigned to him by the company or if he shall become bankrupt or make any arrangement or composition with his creditors or if he shall be incapacitated by ill-health from performing his duties for a period of six consecutive months the company may forthwith determine this agreement and the company shall not be liable to the managing director for any remuneration subsequent to the date of such determination." There, again, it seems to me the word "agreement" must mean the employment of the defendant as managing director. The power given to the directors is in terms to determine this agreement, but I cannot have any doubt that what is intended is that the agreement by which this gentleman is to be employed is to come to an end, leaving his liability to perform the covenants which are to come into effect and have operation as soon as his employment is determined. Clause 9 is the material clause in this case. "The managing director shall not at any time while he shall hold the office of a managing director or afterwards solicit interfere with or endeavour to entice away from the company any person firm or company who at any time during or at the date of the determination of the employment of the managing director were customers of or in the habit of dealing with the company And also will not at any time within five years from the determination of this agreement either solely or jointly with or as agent for any other person firm or company be engaged directly or indirectly in any business similar to that of the company within a radius of three miles from any premises wherein the business of the company shall for the time being be carried on except with the consent in writing of the directors of the company for the time being."

Now, under that agreement the defendant acted as managing director until November or, I think, the end of October of 1931. About that time the directors of the plaintiff company came to the conclusion that in the interests of the company it was desirable to sever the defendant's connection with the plaintiff company. The evidence before me as to that is quite plain, that rightly or wrongly the directors had determined that they were not going to employ the defendant any longer. But they had not, and there is no evidence that they had, considered whether they were entitled to determine his employment under clause 6 of the agreement. They were, at any rate, anxious to put an end to the engagement of him as managing director as soon as possible, and with that end in view the directors of the plaintiff company deputed their chairman, Mr. Baker, to interview the defendant Horne and, if possible, arrange with him the terms upon which he would agree to give up his position as managing director. Mr. Baker has given evidence before me, and he is obviously a truthful person. He gave his evidence fairly, and I have no doubt whatever that he was speaking the truth. The effect of his evidence was that he was deputed by his fellow directors to arrange, if he could, amicably with Horne, the terms upon which Horne would cease to carry on his duties as managing director. Accordingly an interview took place between Horne and Mr. Baker. The interview was on November 17, 1931. It took place shortly before a meeting of the directors, and I think was continued or did not wholly cease after the other directors had assembled. Mr. Horne has not given evidence and, therefore, I have not his account of what took place, but according to the evidence of Mr. Baker the position was fully discussed with Mr. Horne. He at that time had owing to him by the company a sum of some 750*l.*, which was partly commission and salary due to him and partly director's fees. Mr. Baker, on behalf of the company, was prepared to pay the defendant a further sum beyond that which was due to him if he would agree to give up his position. Finally, subject to the authority of the board, Mr. Baker agreed that a sum of 750*l.*, in addition to the 750*l.* due to Mr. Horne, should be paid to him, and that he should give up his position as managing director. The plaintiff company at that time was short of ready money, and it would have been inconvenient to them to have paid the 1500*l.* at once. Finally it was agreed that 500*l.* should be paid by cheque at once, and that the two other sums of 500*l.* should be paid, one on December 1, 1931, and the other on February 15, 1932, the payments being secured by bills. That arrangement the board agreed to and authorized Mr. Baker to accept, and accordingly Mr. Baker drafted in his own handwriting a letter which he had asked Mr. Horne to sign, and which he did in fact sign. The letter, which is dated November 17, 1931, and is addressed to the chairman of the plaintiff company, is written on the plaintiff company's notepaper and stamped with a sixpenny stamp. It is in these terms: "Dear Mr. Baker, I hereby tender my resignation as a director and joint managing director of the Gilford Motor Co., Ld., on terms as arranged with you to-day, namely, that the company pay me a cheque immediately for 500*l.*, and give me two bills for 500*l.* each due on December 1, 1931, and February 15, 1932, respectively, which sum of 1500*l.* I agree to accept in full discharge of all sums due to me by the company, including compensation for cancellation of my joint managing director's agreement. Yours faithfully, E. B. Horne." At the same time Mr. Baker wrote and signed a letter addressed to Mr. Horne of the same date in these terms: "I beg to acknowledge receipt of your letter of to-day's date tendering your resignation as a director and joint managing director of this company on the terms as set out in your letter. I have placed this before my board and they have accepted same to operate from to-day. I have pleasure in handing you herewith cheque for 500*l.* and will see that the two bills for 500*l.* each are forwarded to you. Yours sincerely," and that is signed by Mr. Baker. Then there is a note as to the dates on which the bills are to fall due.

That arrangement having been made, the defendant Horne ceased to have any business connection with the plaintiff company, and ceased to act as its managing director. Shortly afterwards he set up business on his own account at his own private address. He seems to have had printed cards and other documents. For instance, a card which has been exhibited in this case is in this form: "Spares and service for all models of Gilford vehicles. 170 Hornsey Lane, Highgate, N. 6. Opposite Crouch End Lane," with E. B. Horne's name at the bottom, and then, "No connection with any other firm." Similarly there were billheads in much the same form. Admittedly the defendant Horne sent out circulars to various persons in which it was stated that the defendant was ready and in a position to supply spare parts for Gilford vehicles, and in fact he did supply spare parts and at prices which were, I gather, considerably lower than those charged by the plaintiff company, so that in a sense he was doing what is known as undercutting the plaintiff company. He appears to have had some qualms about the matter, because, after he had been carrying on business in that way for a short time, he, through his solicitor, requested the plaintiff company to send him a copy of the agreement of May 30, 1929, and after having received that agreement the defendant company was incorporated on April 8, 1932. The defendant company is a small private company. It has a capital of 500 shares of 1*l.* each, of which 202 have been issued, 101 being issued to the defendant's wife and 101 to one Howard, who was an employee of the plaintiff company and is now an employee of the defendant company. The only two directors of that company are the defendant's wife and Howard, and the registered office of the company is the private house of the defendant, to which there has been added something in the nature of a garage, where his business is carried on. The form of billheads and other documents used by the defendant company were the same as the billheads and documents used by Horne, except that the initials " E. B." were blocked out in black, and the initials " J. M." substituted and the words " and Company " added. That company sent out circulars and other documents inviting persons to deal with it as a company who could supply Gilford motor spare parts, and admittedly some of the circulars which were sent out both by Mr. Horne and by the defendant company were sent to persons or firms who had been customers of the plaintiff company during the period while Mr. Horne was managing director of that company. The defendant company is a company which, on the evidence before me, is obviously carried on wholly by the defendant Horne. Mrs. Horne, one of the directors, is not, so far as any evidence I have had before me, taking any part in the business or the management of the business. The son, whose initials are " J. M.," is engaged in a subordinate position in that company, and the other director, Howard, is an employee of the company. As one of the witnesses said in the witness-box, in all dealings which he had with the defendant company the " boss " or the " guvnor," whichever term is the appropriate one, was the defendant Horne, and I have not any doubt on the evidence I have had before me that the defendant company was the channel through which the defendant Horne was carrying on his business. Of course, in law the defendant company is a separate entity from the defendant Horne, but I cannot help feeling quite convinced that at any rate one of the reasons for the creation of that company was the fear of Mr. Horne that he might commit breaches of the covenant in carrying on the business and in sending out circulars as he was doing, and that he might possibly avoid that liability if he did it through the defendant company. There is no doubt that the defendant company has sent out circulars to persons who were at the crucial time customers of the plaintiff company.

That state of affairs being brought to the attention of the plaintiff company, they on June 14 last year issued the writ in this action, and the statement of claim is framed on the footing that the defendant Horne has committed breaches of the covenants in the agreement, and relief is sought on that ground both against him and against the defendant company. There is a further claim against the defendant company that the defendant company has "Induced, persuaded or employed the defendant Horne to commit the aforesaid breaches of such agreement." No evidence has been adduced before me in support of that claim, and there is no ground on which I could find that that was the fact. It is important to notice that the relief sought in this case is sought wholly upon the covenants in the agreement, and there is no claim against the defendant Horne on the footing that he has made use of confidential information which he obtained while he was managing director by using lists of customers which he had obtained from the plaintiff company, or anything of that sort. Unless the plaintiff company can succeed on the agreement itself, this action cannot succeed at all.

Now the defences set up in this case are three, but either of the first two, if they are good, are sufficient to dispose of this action, and will render any consideration of the case against the defendant company unnecessary. The first defence set up is this. It is said that as a result of what took place on November 17, 1931, the whole agreement of May, 1929, was put an end to; that is to say, not only were the services of the defendant Horne terminated, but he was released from his covenants contained in that agreement. Much reliance is placed, and quite naturally, upon the fact that in the letter of November 17, written by Mr. Baker and signed by Mr. Horne, the word "cancellation" is used, and it is said that what in fact happened was that the agreement was cancelled, so that all rights and obligations on both sides were finally put an end to.

It is perhaps right that I should refer at this stage to the only material entry in the minute book which is under date

November 17, 1931, a minute of a meeting of directors, in which this appears: "The board resolved to accept the resignation as a director and joint managing director of the company on terms as arranged in accordance with the letter handed in and signed by Mr. E. B. Horne," and that is headed "Mr. E. B. Horne."

It is said further, apart altogether from the use of this word "cancellation," that once the parties had come to an agreement to put an end to this written agreement the whole agreement necessarily goes, and that, if that is not so, what the parties were really doing was varying the agreement. That is not the case which is pleaded; if it had been pleaded, the Statute of Frauds might have been an answer to it. It is necessary in considering this matter to bear in mind that throughout this document the word "agreement" is used in more than one place as meaning, not the whole arrangement contained in the document, but the engagement of the defendant as managing director, because, as I have already pointed out, on the very terms of the document itself a part of the arrangement contained in that document —namely, some of the covenants—only come into operation when the engagement of Horne as managing director determines, whether it be determined by effluxion of time, the end of the six years, as provided by clause 2, or whether it be determined at some earlier date under clause 6. Therefore, in my judgment, when the parties came to an arrangement whereby they agreed, as they did, to determine Mr. Horne's engagement as managing director, that did not involve the release by the company of the covenants which were to come into operation as soon as that engagement was determined. As I read clause 9, the covenant against solicitation is to come into operation both during the period while the defendant is managing director and afterwards, and when he ceases to be managing director for any cause, in my judgment he does not cease to be liable to observe the covenant with regard to solicitations.

The result, in my judgment, of what took place on November 17, was that Horne ceased to be managing director of the company, ceased to be entitled to his remuneration as provided by the agreement, but remained under the obligation to observe those covenants which were to have effect after the determination of the agreement. Accordingly, in my view, the first line of defence which has been set up by the defendants does not avail them.

Now the second, and in my judgment perhaps the more difficult line of defence, is this. It is said that this covenant against soliciting is too wide to be enforceable. The question of the validity of covenants in restraint of trade has been considered many times in recent years in cases of the highest authority. In more than one case in the House of Lords the principles applicable to these covenants have been laid down, and it is quite unnecessary for me to attempt to lay them down again. But I may say this, that in approaching these questions the Court has to bear in mind (inter alia) that a covenant which is in restraint of trade is prima facie invalid and that the onus is on the person who seeks to enforce it to show that it is a valid covenant. In order to do that he must prove that the covenant is one which is reasonably necessary for the protection of himself, his business, and is not otherwise contrary to public policy. Further, in my judgment, the employer who seeks to impose a covenant of this kind must see to it that the covenant is framed in terms which are reasonably unambiguous, so that the employee may know what it is he can or cannot do. In my judgment a covenant which leaves the employee in a position of honest doubt as to what the limits of his activities may be is not a covenant which this Court will enforce. It is the duty of the employer to see that the covenant is plain and unambiguous. Now covenants against solicitation of customers are not uncommon, and in many cases they may be necessary for the protection of the employer, but whether a particular covenant is reasonable or not must depend on the facts of each particular case. It is quite impossible to lay down any general rule as to the validity or invalidity of such a covenant as this. It depends, amongst other things, upon the nature of the business, and upon the nature of the employment. A covenant against solicitation of customers might be a perfectly reasonable and proper covenant in the case of one employee, and utterly unreasonable in the case of another in the same business. Further, it has to be borne in mind in considering a covenant of this kind, that, even without such a covenant, an employee is not entitled to make a list of his principal's customers and to take that list away with him at the end of his employment and then use that list for the purpose of endeavouring to divert custom from the employer to himself or other persons in whom he may be interested. That has been held to be an infringement of the rule which forbids an employee to make use of confidential information which he obtains in the course of his employment, and although he cannot be prevented from subsequently using any skill or knowledge which he may have acquired in his former employment he is not entitled to make use of or disclose confidential information so obtained.

With these considerations in mind I approach this particular case. In the first place the defendant was the managing director of the plaintiff company and therefore in a position to know who were the customers of the plaintiff company on its books, or at any rate if he did not know himself he could easily in the course of his business ascertain the names and addresses of the various persons who, while he was there as managing director, had purchased Gilford motors, or had had services rendered to them under service agreements. The position, however, with regard to any persons who came from time to time to the workshop and purchased spare parts, and paid for them on the spot, is very different. Such persons would be persons with whom there might well be no contact whatever with the managing director and whose identity would be wholly unknown to him. Under those circumstances can such a covenant as this be reasonably necessary for the protection of the employers. That necessitates a consideration of the true construction of the covenant. It is a covenant against soliciting "any person firm or company who at any time were customers of or in the habit of dealing with the company." I am told on behalf of the plaintiff company that the words "customers of" and "persons in the habit of dealing with the company" mean exactly the same thing; that the words "persons in the habit of dealing with the company" are mere surplusage, and may be disregarded. The answer to that is this: that if employers are so unwise as to add unnecessary words to a covenant of this kind they must face the fact that the Court will not, prima facie at any rate, treat such words as meaningless, but will endeavour to give a meaning to them, and if, as the result of so construing the document, the scope of the covenant is extended beyond what is reasonable, then the employers have defeated their own ends by the use of unnecessary words. I am wholly unable to say what precisely the phrase used here means. I am not prepared to accept the view that the words "persons in the habit of dealing with the company" are mere surplusage. In my opinion those words were inserted by the employers in the belief that the covenant so worded would include some persons or companies who would not come within the ambit of the word "customers"; otherwise I fail to see the use of putting those words in, but whatever may be the exact meaning of the words, in my judgment this covenant does include not only persons who are customers of the plaintiff company in the sense that their names and addresses are to be found in the books of the plaintiff company, but also any persons who habitually buy spare parts in the shop on a cash basis. As it seems to me, that is a covenant of a very wide nature. I can conceive that if the plaintiffs in this case, having regard to the nature of the defendant's employment, had been content to seek to restrain him from canvassing the customers whose names appeared in the books, or persons whose names were on a list of customers supplied to the defendant, or in some other way had limited and defined what was meant by "customers," such a covenant might have been a reasonable one, necessary for the protection of the plaintiff company and, therefore, enforceable. But in my judgment a covenant which includes persons who from time to time buy spare parts, even though they may be spare parts for the Gilford motor, but who do not enter into any transaction which involves any entry in any book of the plaintiff company, or necessarily ever come to the attention of the defendant in any way, is too wide to be necessary for the protection of the plaintiff company. Such a covenant would prevent solicitation of persons quite unknown to the defendant and whose names he would have no means of ascertaining, and might render him liable for a breach of covenant years afterwards without in the least knowing he had committed that breach, if he chanced to solicit some person who unknown to him had been a customer of the plaintiff company at the material date. It is said that if that did happen, the Court would never commit the defendant; he would be safe from any penalty because the Court would come to the conclusion that he had acted innocently. But that is, in my judgment, not an answer. The plaintiffs have got to satisfy me that the scope of the covenant is not wider than is necessary for their protection, and in my judgment a covenant against solicitation for the rest of the defendant's life of possibly very large numbers of persons with whom the defendant might never have come into touch at all during the whole time of his employment, whose names would not have been known to him, and to whom he might never have even spoken, seems to me far wider than is reasonably necessary for the protection of the plaintiff company. If the covenant was intended to have the less extended meaning than that it was for the plaintiffs to so limit it. The plaintiffs have not done it and, therefore, in my judgment they are unable to establish the validity of the covenant on which they sue.

Finally I would say this, that employers when seeking to impose covenants on their employees in restraint of trade will be very well advised to consider carefully what is really necessary for their protection, and then so to frame their covenants that they take rather less protection than they think is strictly necessary; and, secondly, to see to it that the covenant is framed in terms which leave no reasonable doubt in the mind of the employee what it is he may not do.

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In my judgment this covenant does not fulfil either of those requirements and, accordingly, on these grounds the action fails and must be dismissed with costs.

P. J. B.

The plaintiffs appealed. The appeal was heard on April 27 and 28, 1933.

Sir Herbert Cunliffe K.C. and *W. E. Vernon* for the appellants. The appellants are entitled to an injunction to restrain the defendant from soliciting their customers. At the hearing before Farwell J. every point was decided in favour of the appellants except the question of the unreasonableness of the covenant obtained by the appellants against the defendant. Farwell J. was wrong in holding that a covenant against solicitation of customers must in order to be valid delimit the customers by reference to the employers' books or to a specific list of their names. Such a decision is contrary to many cases which have received judicial approval, including *Trego* v. *Hunt.* (1) The business in connection with which the covenant was enacted was started by the defendant and carried on by him in partnership until a private company was formed. In 1929 the company was turned into a public company, and it was a term made by two persons bringing in a large amount of new capital that the defendant on being employed as managing director of the company should enter into the covenant in question.

It is to be noted that the covenant against solicitation is limited to soliciting persons who were customers during the defendant's employment, and it is substantially identical in form with a covenant in the Encyclopædia of Forms and Precedents (1907 ed.), vol. 13, p. 80. A list of customers was missing after the defendant ceased to be employed by the company, and the persons solicited were all contained in that list.

It has for many years been held reasonable to exact a covenant to prevent solicitation of customers by a servant after he has ceased to be employed provided that the covenant only relates to persons who were customers during the employment: *Trego* v. *Hunt.* (1)

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(1) [1896] A. C. 7.

[Romer L.J. That was a case of vendor and purchaser.]

Cases relating to master and servant are to the same effect: *Mills* v. *Dunham* (2); *Dubowski & Sons* v. *Goldstein* (3); and see *Herbert Morris, Ld.* v. *Saxelby* (4) and *Mason* v. *Provident Clothing and Supply Co.* (5)

Sir Walter Greaves-Lord K.C. and *H. J. Astell Burt* for the respondents. The test in this case is whether the covenant is proved to be reasonably necessary for the protection of the employers. That can only be determined by a consideration of the nature of the employers' business and of the types of persons who would be included in the expression "any customer of or any person in the habit of dealing with" the plaintiff company.

In the case of a traveller or canvasser it is recognized in *Mason's* case (6) that the covenant against solicitation must be limited to customers in the district in which he worked. The proper limit in the case of a multiple shop has never yet been determined, but in the case of a shop with many branches it would obviously be unreasonable that the manager of a South London branch should be prevented from soliciting customers of (say) Hertford. That is the basis of the decision in *Dubowski & Sons* v. *Goldstein.* (3)

Here the defendant was general manager at High Wycombe and had nothing to do with the service depot in Holloway Road.

[*Sir Herbert Cunliffe K.C.* The appellants deny this.]

In any case a covenant not to solicit customers cannot be reasonable unless the customers are personally identified.

[Lord Hanworth M.R. referred to the notes to *Mitchel* v. *Reynolds* (7) in 1 Smith's L. C., 13th ed., pp. 475, 476.]

The present covenant is too wide in all its terms. The covenantor is entitled to know who are the persons he may not solicit. The covenant must not go further than is reasonably necessary for the protection of the employer and must not go so far as to prevent the covenantor from getting his living: *Attwood* v. *Lamont.* (1)

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(1) [1896] A. C. 7.
(2) [1891] 1 Ch. 576.
(3) [1896] 1 Q. B. 478.
(4) [1916] 1 A. C. 688, 702.
(5) [1913] A. C. 724, 734.
(6) [1913] A. C. 724.
(7) (1711) P. Wms. 181.

The respondent also takes the further point that the first agreement containing the covenant was superseded by the second agreement.

[They also referred to *Express Dairy Co.* v. *Jackson* (2); *Smith* v. *Hancock* (3); *Baker* v. *Hedgecock* (4); *Hunt* v. *South-Eastern Ry. Co.* (5); *Patmore* v. *Colburn.* (6)]

Sir Herbert Cunliffe K.C. was not called upon to reply.

LORD HANWORTH M.R. In this case a business was carried on by the Gilford Motor Company, Ld., which had a registered office in Holloway Road, London, and they had a manufacturing place in Green Lanes, at High Wycombe. The business that was carried on was this: they sold motors which were assembled by them, but they were not in fact the actual manufacturers of the whole of the motors thus sold; it was rather that they assembled and then completed the motors that they sold, and were able to supply spare parts for these Gilford motor-cars. The defendant, Edward Bert Horne, was a person who at that time, in May, 1929, was of primary importance in the business that was carried on by the company, and on that date they made an agreement with him whereby he was appointed a managing director, with a right to hold that office for a term of six years from September 1, 1928; that is to say, the span for which he was engaged terminated on September 1, 1934. There were the usual clauses in that agreement. The managing director was to devote his whole time and attention and abilities during business hours to the company and the business of the company; he was entitled to certain holidays; he was entitled to a remuneration of 1250*l.* a year and to a certain percentage on the profits, and during that time he was not to be, directly or indirectly, in any capacity except as a shareholder, interested in any business or company other than the Gilford Company. Then it was provided by clause 9 in terms as follows: "The managing director shall not at any time while he shall hold the office of a managing director or afterwards solicit, interfere with or endeavour to entice away from the company any person, firm or company who at any time during or at the date of the determination of the employment of the managing director were customers of or in the habit of dealing with the company and also will not at any time within five years from the determination of this agreement, either solely or jointly with or as agent for any other person, firm or company, be engaged, directly or indirectly, in any business similar to that of the company within a radius of three miles from any premises wherein the business of the company shall for the time being be carried on." Now it is the interpretation to be given to that clause 9, which has to be decided between the parties in this action, and it is the first part of that clause, of which I have read both limbs, which is in question. What happened was this. Difficulties arose between the company and Mr. Horne, and letters passed on November 17, 1931, that is approximately some three years before the termination of the span for which the managing director was employed. The letters that passed were to this effect, that Mr. Horne tendered his resignation as a director and joint managing director of the company "on terms as arranged with you to-day," and those terms are set out, that there is to be a total of 1500*l.* paid to Mr. Horne by instalments of three several sums of 500*l.*; and he concludes the letter: "I agree to accept in full discharge of all sums due to me by the company including compensation for cancellation of my joint managing director's agreement." The reply of the same date was an acknowledgment of the letter tendering the resignation and stating the Board had accepted the resignation, to operate "from to-day," and it is recorded in a minute of that same day that the Board resolved to accept

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(1) [1920] 3 K. B. 571.
(2) 46 Times L. R. 147.
(3) [1894] 2 Ch. 377.
(4) (1888) 39 Ch. D. 520.
(5) (1875) 45 L. J. (Q. B.) 87.
(6) (1834) 1 C. M. & R. 65.

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the resignation as a director and joint managing director of the company on terms as arranged in accordance with the letter handed in and signed by Mr. E. B. Horne. After that resignation took effect Mr. E. B. Horne established a business and carried it on at his own home, 170 Hornsey Lane, Highgate, and the business he had was one carried on by "E. B. Horne," and there is no doubt that his business was one of supplying spare parts and service for all models of the Gilford vehicles. (I ought to have observed that in addition to the business then carried on by the Gilford Motor Company they carried on the business of service as well as the sale and supply of motors.) Having established himself, or attempted to establish himself, in that way as "E. B. Horne," he became anxious as to whether or not what he was doing—which I will refer to in a moment—was in accordance with, or not in contravention of, the agreement which he had entered into and to which I have referred, and so it was that on March 29, 1932, his solicitor wrote this letter to the Gilford Motor Company: "Dear Sirs, I am acting for Mr. E. B. Horne, the late joint managing director of your company, and I understand that he entered into certain agreements with your company as to service and for sale. As I am desirous of advising him upon the terms of these agreements, I shall be glad if you will be good enough to forward copies to me, and accept this letter as my undertaking to pay your reasonable charges for such copies. Yours faithfully, J. R. Cort Bathurst." The reply on March 30 was: "We are in receipt of your letter of yesterday's date, and in reply would inform you that Mr. E. B. Horne's copy of the original service agreement with this company was left with the writer for safe custody; therefore we have pleasure in enclosing it herewith." Thus the solicitor was on March 30 placed in possession of the agreement of which I have read some and indicated other portions of the terms. Following upon that reply of March 30, 1932, on April 8 a limited company under the title of "J. M. Horne" was incorporated. It was incorporated as a private company, and the paper which had been previously

"E. B. Horne" was altered by blacking out the initials of Mr. E. B. Horne, "E. B.," and inserting at the commencement "J. M." and adding "and Co. Limited." Now it so happens that "J. M." are the initials of the wife of Mr. Horne. That company is a private company, as I have already said; its primary objects are to carry on the business of factors' agents and distributors and vendors and buyers of accessories and spare parts of all classes of vehicles, and so on, and for charabancs, motor-cars, taxis, and so on. The registered office is at the private address of Mr. Horne, 170 Hornsey Lane; the directors are Jessie May Horne, the wife of Mr. E. B. Horne, and Mr. Albert Victor Howard, a person who had been, as I understand, originally in the employ of Gilford Motors, but who was at that time associated with Mr. E. B. Horne in the business which he carried on after November, 1931. The nominal capital was 500*l.* divided into 500 shares of 1*l.* each, and the allotments that were made on April 12 were, as to 101 shares, to Mrs. J. M. Horne, and 101 shares to Mr. A. V. Howard; the solicitor of the company was the writer of that letter of March 29 which I have already read.

Farwell J. heard the evidence about that company and had these documents before him. He says this: "The defendant company is a company which, on the evidence before me, is obviously carried on wholly by the defendant Horne. Mrs. Horne, one of the directors, is not, so far as any evidence I have had before me, taking any part in the business or the management of the business. The son, whose initials are 'J. M.,' is engaged in a subordinate position in that company, and the other director, Howard, is an employee of the company. As one of the witnesses said in the witness-box, in all dealings which he had had with the defendant company the 'boss' or the 'guvnor,' whichever term is the appropriate one, was the defendant Horne, and I have not any doubt on the evidence I have had before me that the defendant company was the channel through which the defendant Horne was carrying on his business. Of course, in law the defendant company is a separate entity from the defendant Horne, but I cannot help feeling quite convinced that at any rate one of the reasons for the creation of that company was the fear of Mr. Horne that he might commit breaches of the covenant in carrying on the business, as, for instance, in sending out circulars as he was doing, and that he might possibly avoid that liability if he did it through the defendant company. There is no doubt that the defendant company has sent out circulars to persons who were at the crucial time customers of the plaintiff company." Now I have recalled that portion of the judgment of Farwell J., and I wish in clear terms to say that I agree with every word of it. I am quite satisfied that this company was formed as a device, a stratagem, in order to mask the effective carrying on of a business of Mr. E. B. Horne. The purpose of it was to try to enable him, under what is a cloak or a sham, to engage in business which, on consideration of the agreement which had been sent to him just about seven days before the company was incorporated, was a business in respect of which he had a fear that the plaintiffs might intervene and object.

Now this action is brought by the plaintiffs, the Gilford Motor Company, Ld., to enforce the terms of clause 9 of the agreement of May 30, 1929, on the ground that the defendant Horne, and the company, as his agent and under his direction, have committed breaches of the covenant which I have read. Admission has been made quite frankly and candidly in this Court, as it was made below, that there have been circulars sent out to the customers of the Gilford Motor Company. The statement is made in the evidence in these terms: "It is admitted now, I gather—although my learned friend says it is small, that does not seem to me to matter, with respect—that persons were solicited by Mr. Horne, both before and after the formation of the company, who were customers of the plaintiff company at the time he was in its service. That is right, is it not?" and Sir Walter Greaves-Lord says: "That is right." So that the learned judge was on sure ground when he said there was a clear admission that these two defendants were soliciting the customers of Gilford Motors; and, as Farwell J. puts it: "Admittedly the defendant Horne sent out circulars to various persons in which it was stated that the defendant was ready and in a position to supply spare parts for Gilford vehicles; and in fact he did supply spare parts and at prices which were, I gather, considerably lower than those charged by the plaintiff company, so that in a sense he was what is known as undercutting the plaintiff company." In other words, there is no defence at all to the claim made in this action unless the conduct of the two defendants can be excused on one of two grounds: firstly, that the covenant is unenforceable in law by reason of the width of its terms, or, secondly, that it has ceased to be operative by reason of the terms which were arranged between the company for the discharge or the release of the managing director from that position on November 17, 1931.

I, therefore, proceed now to consider those two points in order, and, first: Is the covenant unenforceable as being bad in law? I accept the proposition that a covenant in restraint of trade is prima facie one which the law will not enforce, but to that broad proposition there have been many exceptions over a very long period of time, and the famous case of *Mitchel* v. *Reynolds* (1) has decided, by a judgment delivered by Lord Macclesfield, within what limits and terms the Court will enforce such agreements. The old rule was undoubtedly that it must be partial in space or partial in time, but we have to bear in mind that the nature of these agreements has been expounded in the light of later considerations which have gradually arisen as there has been an evolution or development of business transactions. As Rigby L.J. points out in *Dubowski & Sons* v. *Goldstein* (2): "We have now gone far beyond what was supposed to be the law in the time of Tindal C.J. and Lord Denman C.J. I am not surprised that at that time they expressed the opinions they did. Lord Watson has pointed out in the case of *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.* (3) that the opinion of the judges of this age as to matters of public policy may differ very much from that of judges

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(1) 1 P. Wms. 181; 1 Sm. L. C., 13th ed., p. 462.

(2) [1896] 1 Q. B. 478, 484.

(3) [1894] A. C. 535.

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of a bygone age when the circumstances of the world were different. The only test of the validity of an agreement in restraint of trade now is whether or not such an agreement is reasonably necessary for the protection of the person with whom it is made," and, as pointed out on p. 475 of 1 Smith's Leading Cases, dealing with the *Nordenfelt Co.'s* case (1), which went to the House of Lords (2), the true view is "that any restraint, whether general or partial, is prima facie invalid, but may be good if the circumstances of the case show it to be reasonable." We have, therefore, to consider were the terms of this covenant in clause 9 reasonable? Let me just add one further passage from *Mason* v. *Provident Clothing and Supply Co.* (3) Lord Shaw, in dealing with a case where the activities of a canvasser were in question, says: "A very reasonable restriction of a canvasser in such circumstances as are here disclosed might no doubt have been that he should not canvass his old customers or in the limited locality of his former labour. This the law would naturally and properly enforce, and would look upon as a reasonable protection of the employer"; and in *Dubowski's* case (4) Lopes L.J. says (5): "This agreement, like all others, must be construed with regard to the surrounding circumstances. It has been objected to as being too wide in two respects: first, in respect of space; secondly, in respect of time," and he holds that the objection fails in respect of those persons who were customers of the late employers at the time when the employee was in their employ.

Now I turn to this agreement. What is its purpose? It is to protect the business, the profits which are to be earned by the company with the persons, firms or companies who at that time, the time of the employment of the defendant Horne, were customers of the company, and from whom, in the business they did with them, the company derived profit. I repudiate altogether the suggestion that you can, by reason of taking one or two words such as "the habit of dealing with the company," impute a meaning to this covenant that

(1) [1893] 1 Ch. 630.
(2) [1894] A. C. 535.
(3) [1913] A. C. 724, 741.
(4) [1896] 1 Q. B. 478.
(5) Ibid. 483.

it deals with or covers the case of a person from whom the Gilford Motor Company buy and in respect of whose dealings there can be no profit at all arising to the Gilford Motor Company. It is intended to deal with persons who are upon their books or with whom they deal and, in the course of dealing, earn a profit.

Now objection is taken that these words are too wide, and Farwell J. has said that it may be that by reason of the fact that the customers are not defined, or the persons who were in the habit of dealing with the company are not particularized, a danger might accrue to this man from an innocent sale to one of such persons, and he might have been imperilled during all time, long after his employment has ceased, by the nature of such transactions. I cannot agree that such is a fair test to apply to the covenant. It appears to me that this covenant was, as in the many scores of cases in which such covenants have been upheld in these Courts, necessary for the protection of the plaintiff company's business; it operated after the determination of the employment and in respect of persons of whom the defendant himself would have the best knowledge, for he was the managing director of the company, and what it means is that he is not to solicit, to interfere with or endeavour to entice away for his advantage, customers or persons who are in the habit of dealing with the company for the company's advantage. Objection is taken that these words "customers of or in the habit of dealing with the company" either have no meaning or are tautological. I do not agree with that. It appears to me that a customer is a person who frequents a place of business for the purpose of making purchases, and those persons may be determined in a particular way by, for instance, having their names recorded in the books of the company, or they may be upon a list, but there may be other persons who are in the habit of dealing with the company but whose names have not yet been inscribed upon any register of customers, and I see no reason at all to object to the employment of both those terms by reason of the fact that one or other of them might have covered persons who are to be found in the alternative category. Now, if that be so, it appears to me that this is a covenant which was required for the purpose of reasonably protecting the company's business. It does not go so far as to cover customers who become customers after the managing director has left, and it was a covenant entered into by him with full knowledge of what he was doing, and with full knowledge of who were the persons included in that phrase, and it is in respect of them that he is debarred from solicitation, interference or enticing away. The covenant is definite in date ; it is not uncertain, because you have the time at which you are to look for the customers or persons in the habit of dealing, and you have got therefore a covenant which is reasonable in the sense of being necessary for the protection of the plaintiff company's business.

The defendant has, by his own admission, solicited persons who come within the ambit of the covenant. What is the justification ? It appears to me that this is an agreement which must be upheld by the Court, and the plaintiff company are entitled to the protection of the Court, and the injunction must be granted. The question whether in any particular case some casual purchaser from the defendant may cause the defendant to be in danger of further action by the Court is quite a different question. I do not quite understand the meaning of what is called a " casual customer." I think the two words are mutually antagonistic : I think a " customer " is a person who, as I said, frequents the shop ; a casual purchaser seems to be a different person. But, however that may be, we have to say that the plaintiffs are entitled in this action to have this covenant upheld, and an injunction is the proper mode of enforcing that as against these defendants.

The other ground of defence is that there has been an agreement whereby the defendant was released from the restrictive covenant. It will be observed that as the matter went before the Court the defence relied upon an oral agreement to release him, and now suggestion is made that if you look to the letters of November 17 there is a cancellation of the agreement, and the cancellation means a release from clause 9. I do not so read the letters or the entry in the minute book. It appears to me that the defendant rightly stated that there was an oral agreement, and although some of the terms which have been agreed between the parties, particularly the one under which the defendant was to receive compensation, may have been recorded in the letters, in the absence of any specific term dealing with this protective clause 9, I agree with the learned judge and do not accept the view that there has been any release of the clause. Mr. Collier strenuously argued that, inasmuch as there was a new agreement, there was a release of this clause, but that, of course, will depend upon whether or not the new agreement covered the same area that the previous agreement had done. It appears to me that the purpose of the second agreement was to deal with the question of the shortening of the term of the employment, and the compensation to be paid in consequence of that shortening, and was not intended to deal with or release the defendant from the restrictive covenant.

In these circumstances the appeal must be allowed, and for the reasons which I have already stated I think the injunction must go against the company. Sir Walter Greaves-Lord admitted that if the company were such as is indicated by Lindley L.J. in *Smith* v. *Hancock* (1), it would not be possible to object to the injunction going against the company. Lindley L.J. indicated the rule which ought to be followed by the Court: "If the evidence admitted of the conclusion that what was being done was a mere cloak or sham, and that in truth the business was being carried on by the wife and Kerr for the defendant, or by the defendant through his wife for Kerr, I certainly should not hesitate to draw that conclusion, and to grant the plaintiff relief accordingly." I do draw that conclusion; I do hold that the company was "a mere cloak or sham"; I do hold that it was a mere device for enabling Mr. E. B. Horne to continue to commit breaches of clause 9,

(1) [1894] 2 Ch. 377, 385.

and under those circumstances the injunction must go against both defendants, the appeal must be allowed with costs here and below, and the injunction will be in the terms asked in the prayer in the statement of claim.

LAWRENCE L.J. The main question in this case is whether the provision against solicitation contained in the agreement of May 30, 1929, is too wide to be enforceable. The answer to that question depends upon whether, upon the particular facts of the present case, the covenant was reasonably necessary for the protection of the business carried on by the covenantees at the time when it was entered into. In order to determine that question, the Court must have regard, first, to the nature of the business; secondly, to the position of the covenantor; and, thirdly, to the scope of the covenant.

As to the nature of the business, the company carried on the business of suppliers of commercial motor vehicles (including charabancs) and of suppliers of service for such vehicles. In addition to those businesses, the company supplied spare parts for the motor vehicles. The head office of the company was situate in Holloway Road, London, where the company also had a service depot. The company's works were situate at High Wycombe, in Buckinghamshire. As to the position of the covenantor, he was appointed managing director, with the obligation of devoting his whole time and attention to the business of the company, his remuneration consisting of a substantial salary and a percentage of the profits earned by the company. He was, therefore, not in a subordinate position, but in a highly responsible and confidential position, being placed in actual charge of the business of the company.

As regards the scope of the covenant, it is plain that the covenant is limited to the non-solicitation of customers, or persons in the habit of dealing with the company, during or at the date of the determination of the covenantor's employment, and does not extend to prevent the covenantor from soliciting persons who might become customers of the company after his employment had terminated.

In these circumstances I am clearly of opinion that the company was entitled not to have its customers, by solicitation or any other means, enticed away by the covenantor after his employment had terminated. By such a covenant the company was legitimately endeavouring to protect what it had (namely, the chance of its customers continuing to resort to the company, or to its places of business) and not to gain a special advantage which it could not otherwise secure.

Farwell J. seems to have considered that the introduction of the words "or persons in the habit of dealing with the company" after the word "customers" rendered the covenant ambiguous. In my opinion, there is no ambiguity in the covenant, and the covenantor has not ventured to go into the witness-box to say that he did not understand or was in any way embarrassed by the wording of the covenant. The expression "customers," in my judgment, is synonymous with the expression "persons who are in the habit of dealing with the company." The two expressions, to my mind, mean practically the same thing, and the alternative expression introduced after the word "customers" was, in my opinion, inserted as a definition of the latter so as to make it plain that what was intended to be guarded against by the covenant was any interference with or enticing away of those persons who were in the habit of dealing with the company during the covenantor's employment. I cannot myself think that there could have been any reasonable doubt in the minds of the parties to this covenant as to the class of persons who were not to be solicited after the employment had terminated.

The learned judge further held, and I think that this was the main ground of his decision, that the covenant is too wide, and unenforceable, because it does not specify which of the customers the covenantor is not to solicit. The learned judge points out that the covenant is not limited to customers whose names were entered in the books of the company, or to customers mentioned in any list supplied by the company to the covenantor at the termination of the agreement, or to customers who were defined in some other manner. With the greatest respect for the opinion of the learned judge, I find myself quite unable to agree with this conclusion. In my judgment, having regard to the nature of the business and to the position of the covenantor, it was unnecessary further to define the persons who were not to be solicited by the covenantor beyond describing them as the "customers or persons in the habit of dealing with the company during his employment or at its termination." The learned judge seems to have considered that the covenant was too wide because it would include customers who might be in the habit of buying spare parts at the service depot and at the works, without their names being entered in the books of the company and without their becoming personally known to the covenantor. Apart from the question whether there is any evidence in the present case to show that there were any such customers, I am clearly of opinion that the fact that such customers were included in the covenant would not make the covenant too wide. The company, in my opinion, is entitled not to have that class of customers enticed away by solicitation any more than any other of its customers. The covenantor might inadvertently solicit one of that class of customers, but in such a case the Court would not grant an injunction against him or commit him for contempt for the breach of any injunction already granted if he could show that what he had done was done inadvertently, and would not be repeated. But where I think the learned judge has erred, is in making the possibility of such an innocent breach of the covenant a test of its validity. The position to which the covenantor was appointed was one in which he had the fullest opportunity of getting to know every customer of the company, and it seems to me that in these circumstances the restraint placed upon him was a reasonable restraint.

For the reasons stated, I am of opinion that the covenant was one which was reasonably required for the protection of the company, and was neither ambiguous nor did it impose too wide a restraint on the covenantor.

There only remain two subordinate points to be considered. The first is whether the oral agreement arrived at in November, 1932, operated to put an end to the covenant. Upon that question I find myself in entire agreement with the Master of the Rolls and with Farwell J. The question depends upon what took place at the interview at which the oral agreement was arrived at. Apart from the prima facie presumption that the company would not readily have agreed that their managing director who had, for a substantial time, been in control of their business should, on leaving, be permitted to solicit their customers, there is no evidence that at this interview it was agreed that the covenant in question, which was to come into operation after the termination of the employment, should be abrogated.

Secondly, as to the question whether the injunction ought to extend to restraining the defendant company from soliciting the plaintiff company's customers. I am of opinion that the evidence amply justified the learned judge in drawing the inference that the company was a mere cloak or sham for the purpose of enabling the defendant to commit a breach of his covenant against solicitation. I need not recall the facts, but it seems to me that the evidence as to the formation of the company and as to the position of its shareholders and directors leads to that inference. Of course, that inference might have been displaced by evidence adduced on the part of the defendants, but although the issue was plainly raised on the pleadings, no such evidence was forthcoming. In these circumstances, I agree with the finding by the learned judge that the defendant company was a mere channel used by the defendant Horne for the purpose of enabling him, for his own benefit, to obtain the advantage of the customers of the plaintiff company, and that therefore the defendant company ought to be restrained as well as the defendant Horne.

I agree that this appeal ought to be allowed, with the consequences stated by the Master of the Rolls.

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ROMER L.J. I have come to the same conclusion. The covenant with which we have to deal in the present case is obviously a covenant in restraint of trade. It is, therefore, prima facie, unenforceable. It can, however, be enforced, if it be shown that the covenant was reasonably necessary and not more extensive than was reasonably necessary for the protection of the covenantee. The particular covenant with which we have to deal is a covenant which is commonly referred to as a covenant against solicitation; that is to say, it is a covenant by an employee that he will not, after his employment shall have ceased, solicit orders from customers of his employers' business who were such at the time of the cessation of his employment or had been such during the existence of that employment. It is not, of course, every such covenant that is reasonably necessary for the protection of the employers. I can quite readily conceive cases in which such a covenant by an employee is in no way necessary for the protection of the employer. The question whether it be necessary or not depends upon the nature of the business carried on by the employer and the nature of the employment that is being given to the employee. It has, however, been frequently recognized in these Courts and is, in my opinion, established law, that where an employee is being offered employment which will probably result in his coming into direct contact with his employer's customers, or which will enable him to obtain knowledge of the names of his employer's customers, then the covenant against solicitation is reasonably necessary for the protection of the employer. In the present case the covenantor was employed as a managing director of the company, who are the covenantees, and it is perfectly obvious that at the date of his employment it was extremely probable, if not certain, that he would come into contact with the customers of his employers who were customers during the term of his employment. Now, in those circumstances, I should have thought that this covenant was enforceable. I will not read the covenant again, nor do I intend to comment upon the precise words in which that covenant is framed. It is sufficient to say that in my opinion it restrains the covenantor from soliciting in the way of the business such as is carried on by the employers, persons who were customers of the employers during, or at the date of, the termination of the defendant's employment as managing director. I do not myself think that the words " or in the habit of dealing with the company " enlarge or diminish in any way the meaning of the word " customers." But it was said, and the argument has found favour with Farwell J., that the covenant is unenforceable because the particular customers whom the defendant is precluded by the covenant from soliciting are not sufficiently defined in the covenant. Farwell J. said that if the plaintiffs in this case had been content to seek to restrain the defendant from canvassing the customers whose names appear in the books, such a covenant would be a reasonable one. But so to limit a covenant against solicitation would not be sufficient protection for the employers. There may be customers with whom the employee has come into contact, whose names he would know, whose names do not appear in the books, and in a case where the employee is a person, one of whose duties might be to see that the names of customers were inserted in the books, a covenant so restricted obviously would not be a proper or sufficient protection for the employers. Farwell J. also said that the covenant would be enforceable if the plaintiffs had been content to confine the customers to persons whose names were specified in a list of customers supplied to the defendant. It must be remembered, however, that the question whether the covenant is a valid one or not, that is to say, whether it is a reasonable covenant or not, is a question which has to be determined as at the date of the covenant being entered into. At that time, quite clearly, it would be impossible to supply the defendant with a list of persons who would become customers during the term of his employment. Further, the covenant as a matter of fact extends in the present case not only to the period after the defendant's employment has come to an end, but also to the period covered by the term of his employment. I do not

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think it reasonable to suppose that the employers are from time to time, during the man's employment, to hand to him a list of the customers of the firm, so that he might know what customers he might and what customers he might not solicit during the term of his employment. Then Farwell J. referred to, as other cases in which the covenant might be enforceable, cases in which in some other way the meaning of the word "customers" was limited or defined. With great respect to the learned judge, I cannot myself think of any other way in which, consistently with the proper protection of the employers, the customers who are not to be solicited can be limited or defined other than by calling them "customers." There are numerous cases before the Courts where covenants against the solicitation of customers have been considered, and I know of no authority, and certainly our attention has not been called to any authority, where any such limitation upon the covenant as is suggested by Farwell J. has been held to be necessary. Of the cases to which we have been referred in which such covenants have been held to be good, there was no such limitation. In *Mills* v. *Dunham* (1), in which there was a very wide covenant, a covenant in the sense that it extended not only to soliciting but to transacting business with customers of the employer, no such words of limitation were to be found. The covenant was against transacting business with or soliciting orders from "any person or firm who, during the continuance of this agreement, shall be customers of the" employers. The case came before Chitty J. and afterwards before the Court of Appeal, and in neither Court was it suggested, either in argument or judgment, that any such limitation of the word "customers" was necessary in order that the covenant should be enforceable. Another case to which our attention was called was *Dubowski & Sons* v. *Goldstein.* (2) That was a case of a covenant entered into by an employee of a man carrying on a milk business, who was employed as a milk carrier, and the covenant was that he would not

(1) [1891] 1 Ch. 576.

(2) [1896] 1 Q. B. 478.

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"interfere with, or cause to be solicited or interfered with, any of the customers who shall at any time be served by or then belonging to the employer his successors or assigns in the said business." Again, it was never suggested that any such limitation was necessary in order that the covenant might be enforced, and, in my opinion, with the greatest deference to Farwell J., no such limitation is necessary. The limitation that is necessary, of course, is a limitation to persons who are customers during the employment of the covenantor. No such limitation as is suggested by Farwell J. is, in my opinion, necessary.

So far as regards the other two points upon which reliance was placed by the respondents, I do not wish to add anything. In my opinion Farwell J. was right in the conclusion to which he came as to the effect of the oral agreement come to between the parties in the month of November, 1931, and was right in coming to the conclusion, as I think he did conclude, that this defendant company was formed and was carrying on business merely as cloak or sham for the purpose of enabling the defendant Horne to commit the breach of the covenant that he entered into deliberately with the plaintiffs on the occasion of and as consideration for his employment as managing director. For this reason, in addition to the reasons given by my Lords, I agree that the appeal must be allowed, with the consequences which have been indicated by the Master of the Rolls.

Appeal allowed.

Solicitors for appellants: *Cardew Smith & Ross.*
Solicitor for respondents: *J. R. Cort Bathurst.*

W. I. C.

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JEANS *v.* GATEHOUSE.

[1933. R. 256.]

Will—Specific Devise and Bequest—Costs of Upkeep and Preservation between Dates of Testator's Death and Executors' Assent—Incidence.

The costs of the preservation and upkeep of property specifically devised and bequeathed between the date of the testator's death and the date of the executors' assent are payable by the specific devisees and legatees.

In re Pearce [1909] 1 Ch. 819 followed.

Sharp v. *Lush* (1879) 10 Ch. D. 468 not followed.

ADJOURNED SUMMONS.

By her will dated August 7, 1931, Susannah Georgina Rooke (hereinafter called "the testatrix"), of "Norbury," 53 Paisley Road, West Southbourne, Bournemouth, provided (inter alia) as follows: "I give and bequeath to Margaret Hine Gatehouse . . . . my freehold dwelling-house . . . ." (i.e., "Norbury") "and its contents. . . . ." The testatrix died on September 26, 1932. The executors incurred expenses in maintaining the freehold house and its contents. By this summons, at the date of which the executors had not yet assented to the specific devise and bequest, one of the executors asked (inter alia) whether the expenses and outgoings incurred in the upkeep and preservation of the dwelling-house and the contents pending the assent to the specific devise and bequest ought to be borne by the specific devisee and legatee or by the testatrix's general estate.

C. R. R. Romer for the plaintiff executor.

L. W. Byrne for the specific devisee and legatee. In *Sharp* v. *Lush* (1) Sir George Jessel M.R. held that the expense of warehousing specific legacies was an executorship expense because it was incident to the executor's office. The question came more recently before Eve J. in *In re*

(1) 10 Ch. D. 468, 472.

Pearce (1), in which it was held that the upkeep and preservation of specifically bequeathed property from the date of the testator's death to the date of the executors' assent must be paid for by the legatee. In *Perry* v. *Meddowcroft* (2) it was held that the expense of recovering costs due to a testator and bequeathed by him was payable out of the testator's estate. That decision seems to have been regarded with disfavour by Parker J. in *In re De Sommery.* (3) It was criticized in *In re Scott* (4), but there is no criticism there of *Sharp* v. *Lush.* (5)

[*Beebee* for the Parish Council of Breamore and churchwardens of Breamore Church, interested also in another question, referred to *In re Grosvenor.* (6)]

Sharp v. *Lush* (5) was not cited in *In re Grosvenor.* (6) See also *Inland Revenue Commissioners* v. *Hawley* (7) and *Barnardo's Homes* v. *Special Income Tax Commissioners.* (8) In the present case it does not seem reasonable that the costs of preservation pending transfer should be borne by the beneficiary.

Henry Johnston for pecuniary legatees.

D. Ll. Jenkins for the rector and churchwardens of Studland Church, interested also in another question.

J. M. Paterson for an executrix and legatee.

H. O. Danckwerts for the Attorney-General.

MAUGHAM J. It is curious that there should be a difference of opinion between learned judges on the comparatively simple question whether the costs of preservation of a specific legacy ought to be borne by the legatee until the legacy has been assented to, or whether the costs of the upkeep and preservation of the legacy from the date of the testator's death to the date of the assent ought to be paid as part of the administration expenses and to be borne by the estate. One would have expected that such a matter would have been perfectly well settled by decisions for hundreds of years. That, however, is not so. In *Sharp* v. *Lush* (1) Sir George Jessel M.R. had to deal with expenses incurred by executors in warehousing, before distribution, certain furniture which had been specifically bequeathed. The matter came before him on further consideration and he said: "The remaining item is for warehousing specific legacies. It is the duty of the executor, as such, to take care of specific legacies. It is his duty, as such, not to assent to the payment of them until he ascertains there are sufficient assets; therefore it must be a duty incident to his office to take care of them during the intervening period. I am of opinion, therefore, that the expense incurred for warehousing these legacies is an expense incident to the office of the executor, and therefore is an 'executorship expense.'" In *In re Pearce* (2) a similar question came before my brother Eve. The plaintiffs in that case, who were executors, had incurred considerable expenses in the upkeep of furniture and effects which had been bequeathed by the testator to his wife, and in paying wages and expenses in connection with a yacht bequeathed to his wife. The case was an important one and many authorities were cited on both sides, though *Sharp* v. *Lush* (3) seems to have evaded the vigilance of counsel, and Eve J. said (2): "Now it seems to be settled law that when an executor gives his assent to a specific legacy the assent relates back to the death of the testator, and the specific legatee is entitled to the profits accrued due from the time of the testator's death. That being so, it seems to me to be right and fair that the specific legatee should be charged with the costs of the upkeep, care, and preservation of the specific legacy from the time of the death until the executor's assent, and I shall make a declaration to that effect, and direct an inquiry what expenses were properly incurred in and for such upkeep, care, and preservation." *In re De Sommery* (4) is a well known case which came before Parker J., as he then was. There was an elaborate judgment in the course

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(1) [1909] 1 Ch. 819.
(2) (1842) 4 Beav. 197.
(3) [1912] 2 Ch. 622, 628.
(4) [1915] 1 Ch. 592, 607.
(5) 10 Ch. D. 468, 472.
(6) [1916] 2 Ch. 375.
(7) [1928] 1 K. B. 578.
(8) [1921] 2 A. C. 1.

(1) 10 Ch. D. 468, 472.
(2) [1909] 1 Ch. 819, 821.
(3) 10 Ch. D. 468.
(4) [1912] 2 Ch. 622.

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Considered. *In re* de Carteret **Maugham J. 103**

—— *Peel's Release, In re* [1921] 2 Ch. 218.
Followed. *In re* Talbot **Maugham J. 895**

—— *Pettit, In re* [1922] 2 Ch. 765.
Distinguished. *In re* Jones **Eve J. 842**

—— *Portman* v. *Portman (Viscount)* [1922] 2 A. C. 473.
Considered. *In re* Hind **Maugham J. 208**

—— *Prescott* v. *Prescott* [1906] 1 I. R. 155.
Approved and followed. Cousins *v.* Sun Life Assurance Society **Eve J. and C. A. 126**

—— *Price, In re* [1928] Ch. 579.
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—— *Randell, In re* (1888) 38 Ch. D. 213.
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—— *Robb* v. *Watson* [1910] 1 I. R. 243.
Doubted. Cousins *v.* Sun Life Assurance Society
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—— *Russell, Ex parte* (1882) 19 Ch. D. 558.
Followed. *In re* Patrick & Lyon, Ld. - - - **Maugham J. 786**

—— *Russian and English Bank, In re* [1932] 1 Ch. 663.
Followed. *In re* Russian Bank for Foreign Trade
Maugham J. 745

—— *Rustomjee* v. *Reg.* (1876) 1 Q. B. D. 487; 2 Q. B. D. 69.
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—— *Rylands* v. *Fletcher* (1868) L. R. 3 H. L. 350.
Applied. Att.-Gen. *v.* Corke
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—— *Sandbrook, In re* [1912] 2 Ch. 471.
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—— *Schiff, In re* [1921] 1 Ch. 149.
Followed. Administrator of German Property *v.* Knoop
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—— *Sharp* v. *Lush* (1879) 10 Ch. D. 468.
Not followed. *In re* Rooke
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—— *Sinclair* v. *Brougham* [1914] A. C. 398.
Applied. *In re* Airedale Co-operative Worsted Manufacturing Society, Ld. - - **Eve J. 639**

—— *Society for Promoting Employment of Women, In re* [1927] W. N. 145.
Distinguished. *In re* Scientific Poultry Breeders' Association, Ld. - - - - **C. A. 227**

—— *Stillwell, In re* [1916] 1 Ch. 365.
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Luxmoore J. 669

—— *Sykes* v. *Williams* [1932] 2 Ch. 190.
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—— *Taylor* v. *Allhusen* [1905] 1 Ch. 529.
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—— *Taylor* v. *Haygarth* (1844) 14 Sim. 8.
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—— *Tong, In re* [1931] 1 Ch. 202.
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—— *Trevor* v. *Whitworth* (1887) 12 App. Cas. 409.
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—— *Wakley, In re* [1920] 2 Ch. 205.
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—— *Walbran, In re* [1906] 1 Ch. 64.
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—— *Webb* v. *Whiffin* (1872) L. R. 5 H. L. 711.
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—— *Weld-Blundell* v. *Stephens* [1919] 1 K. B. 520; [1920] A. C. 956, 997.
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In re Clergy Orphan Corporation Trusts. Clergy Orphan Corporation *v.* Christopher - - - **Farwell J. 267**

2. —— *United Methodist Church—Trust for Ministers' Salaries—Proviso for Defeasance on Union with " Other Religious Body " —Union with other Methodist Churches—Proviso Void for Perpetuity — Methodist Church Union Act,* 1929 (19 *&* 20 *Geo.* 5, *c. lix.*), *s.* 18.

In re Bowen [1893] 2 Ch. 491 and *In re Peel's Release* [1921] 2 Ch. 218 followed.

In re Randell (1888) 38 Ch. D. 213 and *In re Blunt's Trusts* [1904] 2 Ch. 767 considered and distinguished. *In re* Talbot. Jubb *v.* Sheard - - - - **Maugham J. 895**

3. —— *Will—Trust for Home of Rest —Further Wishes of Testator in regard to Home not to be binding if impracticable—*

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In re James [1932] 2 Ch. 25 followed. *In re* Chaplin. Neame *v.* Attorney-General - - - - **Maugham J. 115**

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In re Gardom [1914] 1 Ch. 662 and *In re Clarke* [1923] 2 Ch. 407 followed.

Pease v. *Pattinson* (1886) 32 Ch. D. 154, and *In re Lacy* [1899] 2 Ch. 149 considered. *In re* de Carteret. Forster *v.* de Carteret **Maugham J. 103**

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In re Marlborough Club Co. (1868) L. R. 5 Eq. 365 distinguished. *In re* Aidall, Ld. **Maugham J. and C. A. 323**

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3. —— *Debentures — Australian Company—Debentures issued in Australia—Registered Offices in Australia and London—Moneys secured Payable in Australia or London at Holder's Option — Register of Debenture Holders established in London—Transfer of some Debentures to Register in London—Option to be paid in London exercised—"Australian Pound"—Payment in London whether in Sterling or Australian Currency.*

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In re Société Intercommunale Belge d'Électricité. Feist *v.* The Company. **Farwell J. and C. A. 684**

5. —— *Guarantor of Preference Dividends—No Right of Action as Creditor against Company for Amounts paid under Guarantee—Subrogation to Preference Shareholders.*

Principles of *Trevor* v. *Whitworth* (1887) 12 App. Cas. 409 applied. *In re* Walters' Deed of Guarantee. Walters' "Palm" Toffee, Ld. *v.* Walters - **Maugham J. 321**

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Incorporated Glasgow Dental Hospital v. *Lord Advocate* 1927 S. C. 400 followed and approved.

In re Society for Promoting Employment of Women [1927] W. N. 145 distinguished.

Decision of Eve J. [1932] 2 Ch. 212 reversed. *In re* Scientific Poultry Breeders' Association, Ld. - **C. A. 227**

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9. —— —— *Fraudulent Trading by Director—Declaration of Liability—Recovery of Moneys from Director—Application of Moneys recovered—Companies Act*, 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *ss.* 156, 275.

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10. —— —— *Fraudulent Preference — Mortgage by Deposit of Deeds — Failure of Mortgagees to register Mortgage with Registrar of Companies—Application for Extension of Time—Notice to and Appearance by Company—Withdrawal of Opposition to Application—Order made to extend Time—Form of Order—"Judicial proceeding taken or suffered"—Bankruptcy Act*, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 44—*Companies Act*, 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *ss.* 79, 80, 85, 265.

In re Cohen [1924] 2 Ch. 515 discussed and explained and headnote stated to be inaccurate.

Dictum by Buckley J. in *In re Cardiff Workmen's Cottage Co.* [1906] 2 Ch. 627, 630, dissented from by Romer L.J. *In re* M. I. G. Trust, Ld. - - **Eve J. and C. A. 542**

11. —— —— *Hire-purchase Agreements—Financing Agreement with Discount Company — Assignment of Goods subject to Hire-purchase Agreements—Whether Contract of Sale or Charge—Sale—Not invalid against Creditors for want of Registration—Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *s.* 93—*Companies Act*, 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *s.* 79.

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12. —— —— *Insolvency—Debenture issued within Six Months of Winding-up—Arrangement as to Application of Part of Moneys advanced—Payment of past Debt for Goods supplied by Firm of which Lender was a Partner—"Except to the amount of any cash paid to the company"—Validity of Floating Charge—Companies Act*, 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *s.* 266.

In re Orleans Motor Co. [1911] 2 Ch. 41 distinguished.

Dictum of Astbury J. in *In re Hayman, Christy & Lilly, Ld.* [1917] 1 Ch. 283, 285 disapproved. *In re* Matthew Ellis, Ld. **Eve J. and C. A. 458**

13. —— —— *No Trading Profit—Debentures issued to Director—Winding Up just over Six Months later—" Fraud "—" Fraudulent Purpose "—Dishonesty Essential—Companies Act*, 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *s.* 265, *sub-s.* 1; *s.* 266; *s.* 275, *sub-ss.* 1, 2.

Ex parte Russell (1882) 19 Ch. D. 588 and *London and Counties Assets Co.* v. *Brighton Grand Concert Hall and Picture Palace, Ld.* [1915] 2 K. B. 493 followed. *In re* Patrick & Lyon, Ld. - - - **Maugham J. 786**

14. —— —— *Russian Company—Branch in England—Unregistered Company—Dissolution in Russia—No Communication by Russian Government with Branch in England—Petition to Wind Up—Petitioner's Debt Disputed — Jurisdiction — Companies Act*, 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *ss.* 337, *para.* 3; 338, *sub-s.* 1, *para.* (*d*).

In re Russian and English Bank [1932] 1 Ch. 663 followed.

Aksionairnoye Obschestvo A. M. Luther v. *James Sagor & Co.* [1921] 3 K. B. 532 and *Morgan* v. *Larivière* (1872) L. R. 7 Ch. 550; (1875) L. R. 7 H. L. 423, considered. *In re* Russian Bank for Foreign Trade **Maugham J. 745**

15. —— —— —— *Place of Business in England—Unregistered Company—Dissolution in Russia—Service in England of Petition to Wind Up—Companies Act*, 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *s.* 338, *sub-s.* 1, *para.* (*d*)—*R. S. C., Order* lxvii., *r.* 6—*Companies (Winding Up) Rules*, 1929, *r.* 28.

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Weld-Blundell v. *Stephens* [1919] 1 K. B. 520; [1920] A. C. 956, 997 followed. Bradstreets British, Ld. *v.* Harold Mitchell and Carapanayoti & Co., Ld.
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Middleton v. *Spicer* (1783) 1 Bro. C. C. 201; *Dyke* v. *Walford* (1846–48) 5 Moo. P. C. 434; *Megit* v. *Johnson* (1780) 2 Dougl. (K. B.) 542; and *Taylor* v. *Haygarth* (1844) 14 Sim. 8 applied.

Obiter dictum of Wright J. in *In re Higginson & Dean* [1899] 1 Q. B. 325, 332 dissented from.

Hastings Corporation v. *Letton* [1908] 1 K. B. 378 discussed and distinguished. *In re* Sir Thomas Spencer Wells. Swinburne-Hanham *v.* Howard - - - **C. A. 29**

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Linton v. *Linton* (1885) 15 Q. B. D. 239 followed.

Dunn v. *Dunn* (1888) 13 P. D. 91 followed.

In re Stillwell [1916] 1 Ch. 365 not followed.

In re HEDDERWICK. MORTON *v.* BRINSLEY
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Colls v. *Home & Colonial Stores, Ld.* [1904] A. C. 179 and *Ankerson* v. *Connelly* [1906] 2 Ch. 544; [1907] 1 Ch. 678 discussed. SMITH *v.* EVANGELIZATION SOCIETY (INCORPORATED) TRUST
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Lingké v. *Christchurch Corporation* [1912] 3 K. B. 595 considered.

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Under the Superintendence and Control of the

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(Including Bankruptcy Cases.)

1933.—Vol. I. Ch.

(p. 1 to p. 125).

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For Mode of Citation, see Beginning of Index.
[*For Names of Editors and Reporters see Inside.*]

PUBLISHED by THE COUNCIL at its office, 30, MONTAGUE STREET,
LONDON, W.C. 1,
AND
Printed by W. SPEAIGHT & SONS, LTD., 98-99, FETTER LANE, LONDON, E.C. 4.

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